entered judgment against NEI in favor of the plaintiff class. Pet. App. 84a. The judgment ordered NEI to deposit $1.995 million into the court registry to secure class damages in that amount, Pet. App. 62a, even though the court had stated at the hearing that "we will have to have a claims hearing and try to figure out what the actual damages are, if any." Pet. App. 84a.

The class was certified under ARK. R. CIV. P. 23(b), which prescribes substantially the same process as does FED. R. CIV. P. 23(b)(3). The Arkansas rule requires notice to class members in cases seeking damages, but it does not explicitly require notice before a determination of the merits of class claims. The trial court refused to require notice to absent class members in this case, stating:

> NEI also argues that it is improper for Plaintiffs to seek a judgment prior to obtaining class certification citing authority for the proposition that summary judgment in a class action is *generally* not awarded until the class has been certified and notified, citing *Schwarzschild v. TSE* [sic], 69 F.3d 293, 295 (9th Cir. 1995). In *Schwarzschild*, the Ninth Circuit explained that "pre-judgment certification and notice to the class are necessary to protect the defendant from future suits by potential members of the class." *Id.* at 297.
>
> For a number of reasons, this argument made by Defendants is not valid. First, this is no ordinary case. The federal district court certified a class in September 1997, well over six years ago. Notices were sent to all known potential class members at that time.

> Second, after the class was certified in federal court and notices were sent, no additional suits were filed, and no putative class members sought to intervene or opt out of the class. No separate class members entered appearances through different counsel.
>
> Finally, the rationale for pre-judgment certification and notice, that the Defendants should be protected from future suits by potential class members, is not present here. Plaintiffs' cause of action arose in December 1993. No other suits by the class or those similarly situated to the class have been filed during the more than eleven years since Plaintiffs' use of their time-share interest was terminated. Thus the basis for forbidding pre- certification judgment for the Plaintiffs is not present.

Pet. App. 51a- 52a.

**The Arkansas Supreme Court Ruling.** NEI appealed the judgment to the Arkansas Supreme Court, arguing that the trial court erred by (1) awarding judgment before determining damages, (2) requiring bond in the full amount of the potential damages, and (3) determining the merits of the action after certifying the class but before providing notice to absent class members. The Arkansas Supreme Court initially reversed the entry of judgment but affirmed the determination of the merits and the requirement of the bond. The Arkansas Supreme Court ruled that NEI had "waived" any need for notice to absent class members before their claims were adjudicated. Pet. App. 11a. On rehearing, NEI argued that requiring a bond in advance of judgment was an

unconstitutional taking of property and that NEI could not waive the due process rights of absent class members to notice and an opportunity to opt out before their claims were determined. Pet. App. 86a-87a. The Arkansas Supreme Court modified its opinion to reverse the requirement of the bond, but it did not change its ruling that NEI had waived notice to absent class members before the trial court determined their claims.

The Arkansas Supreme Court reasoned as follows:

> Notice is designed to provide class members with the ability to opt out of the class before liability is resolved and damages determined and protects defendants from a multiplicity of suits from individual class members. Here, however, National Enterprises moved for summary judgment on liability issues before notice was given to the class.
>
> * * *
>
> We conclude that National Enterprises waived the notice issue. Though Arkansas has no specific authority on this point, federal case law is significant. See, e.g., Swartzchild [sic] [v. Tse, 69 F.3d 293 (9th Cir. 1995)]; Postow v. OBA Fed. Sav. and Loan Ass'n, 627 F.2d 1370, 1380-85 (D.C. Cir. 1980) (held no error where final designation of class and sending of notice to members occurred after trial court denied defendant's summary-judgment motion and later granted plaintiff's summary-judgment motion). Moreover, we do not view the fact that National

> Enterprises was unsuccessful in its summary-judgment motion as decisive, as National Enterprises contends. It would make little sense for a defendant to move for summary judgment on liability issues before notice, lose on that motion, and then argue that the court's judgment violated notice requirements. We, therefore, hold that National Enterprises's [sic] motion for summary judgment on liability issues prior to class notice waives the mandate that notice be given under Rule 23(c).

Pet. App. 10a-11a.

## REASONS FOR GRANTING THE PETITION

This case raises important constitutional questions concerning the rights of absent class members to notice and an opportunity to opt out before a trial court determines the merits of their claims. Although this Court's precedents have been consistent in describing these rights of absent class members as constitutional due process rights, the lower courts routinely discuss these issues not in terms of due process, but instead in terms of Rule 23 and the out-moded problem of "one-way intervention," which led to the 1966 revision to FED. R. CIV. P. 23. Some federal appellate decisions have confused distinct issues concerning the timing of class certification in relation to deciding dispositive motions with the due process issues of notice to absent class members. As a result, these decisions lost grasp of the due process issues, and one, *Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370 (D.C. Cir. 1980), erroneously determined class claims without notice to absent class members. *Postow* and courts relying on *Postow* have developed a novel but unacceptable

concept of waiver in which the defendant's conduct affects the process due to absent class members. The Arkansas courts based their erroneous waiver rulings squarely on *Postow* and its ill-conceived waiver doctrine.

This case presents an opportunity for this Court to clarify the due process interests of an absent, out-of-state class member in a case where a Rule 23(b)(3) class was certified but notice was not provided before class claims were decided. In addition, this Court should rule unambiguously that an opposing party cannot waive the constitutional rights of absent class members to notice after class certification.

## I. Individualized Notice To Absent Class Members Was The Process Due In The Circumstances Of This Case.

The plaintiff class consists of no more than 300 individuals, most of whom reside outside Arkansas. In the federal action, class counsel produced verified statements from 112 class members containing damages calculations. The class members received notice in the federal action six years earlier from the same lawyers who represent the class now.

Each class member has a property interest in the timeshare development. Once the class was certified, the absent class members were entitled to due process, and the only constitutional question was: what process is due? Considering the six-year-old notice to the same class in the federal action and the limited size of the class, absent class members were entitled to individualized notice of their claims pending in the Garland County Circuit Court before that court determined the merits of those claims.

Yet class counsel argued to the trial court, and the trial court agreed, that the absent class members should not be notified until after determination of their claims. Judgment was entered the same day the class was certified. Neither counsel nor the trial court protected the due process interests of absent class members.

The federal-court notice in 1997 provided notice of an action pending in the United States District Court for the Western District of Arkansas, which was later found to lack subject-matter jurisdiction. Although the legal theories and defendants were the same after remand to the state court, absent class members might have had a different reaction to having their claims adjudicated in Garland County as opposed to a federal court. In addition, in those six years an individual absent class member might have had a change of mind or heart concerning the pendency of litigation in Arkansas, and the absent class member might have wanted to litigate in a different forum, seek different relief, have a different lawyer, or not litigate at all. The trial court deprived absent class members of these choices concerning their interests, and in so doing deprived them of due process.

The old notice in the federal court did not provide due process six years later in the state court. The identity of the class must have changed in the intervening six years; owners of timeshare units in 1997 may have died, and their interests may have passed to their heirs or estates. There is no record about the class as it existed in 2004. New owners, who had never had notice even from the federal court, would presumably want the opportunity to make their own decisions concerning the litigation of their property interests, and the Constitution protects that interest by requiring notice in 2004 before those claims were determined.

The trial court recognized that absent class members have a right to individualized notice, but, adopting the suggestion of class counsel, ruled that notice should be provided *after* judgment on the class claims. The Arkansas Supreme Court recognized the error in this procedure to the extent that a judgment could not be entered without a determination of damages, which required individualized findings. Thus the Arkansas Supreme Court reversed the judgment in favor of the class, but it affirmed the merits determination of the class claims without notice to absent class members. The adjudication of their claims has occurred without their knowledge.

NEI has standing to assert this issue because of its interest in obtaining *res judicata* with respect to all class members, which is the same "unique predicament" of the class action defendant in *Phillips Petroleum v. Shutts*, 472 U.S. 797, 805-06 (1985). Reasonable notice is "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). So long as class certification is not denied, the limitations period is tolled as to absent class plaintiffs, *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 552-53 (1974), and here those claims have been tolled since 1996. A no-notice determination in a circuit court in Arkansas will not bind absent plaintiff class members and will not be entitled to full faith and credit in other states. *Shutts*, 472 U.S. at 811-12.

## II. The Lower Courts Are Confused About The Doctrine Of Waiver And The Different Interests Of Absent Class Members And Their Opposing Parties.

The wholesale revisions to federal Rule 23 in 1966 addressed problems involving so-called spurious class actions, which would include this case, where several parties with independent interests would join as a class because of common questions or common prayers for relief. One of the issues in a spurious class action was the problem of "one-way intervention," in which a member of the class could wait until after a determination of the merits to decide whether to join the action, permitting intervention if the result were favorable and avoiding any unfavorable decision. One-way intervention had created a sharp debate among commentators and conflicting views among courts. The 1966 amendments defined the spurious class action as a class maintainable under FED. R. CIV. P. 23(b)(3) and specified that there must be an early determination of class certification in such cases and, if a class were certified, there must be notice of the action to give absent class members an opportunity to opt out. The Advisory Committee Notes provide that this mandatory notice was designed to fulfill due process requirements in class actions. This Court reviewed this history of the 1966 amendments in *American Pipe*, 414 U.S. 538, and it has described the due process dimensions of notice to absent class members in *Eisen v. Carlisle & Jacquelin*, 414 U.S. 908 (1973), and in *Shutts*, 472 U.S. 797. These reforms eliminated the possibility of one-way intervention because class members would have notice and be forced to remain in the class or opt out before the merits were decided.

Notwithstanding the explicit notice requirements of federal Rule 23 for Rule 23(b)(3) class actions, and despite this Court's discussion of the due process rights of absent class members in *Eisen* and *Shutts*, the lower federal courts and state supreme courts have repeatedly become entangled in class-action notice issues and the old problem of one-way intervention. The direct precedents from the federal courts that gave rise to the erroneous waiver ruling by the Arkansas Supreme Court in this case are themselves examples of the confusion in the lower courts concerning this issue.

**The Trouble with *Postow* and *Schwarzschild*.** One of the federal precedents, *Postow*, specifically held on a complicated procedural history that where the defendant moved for summary judgment before class certification and notice, a 23(b)(3) class could be certified, and notice provided, after the court had resolved the merits in favor of the plaintiffs. 627 F.2d 1370. The notice was to be carefully drafted to *avoid* informing the absent class members of the fact that the merits had been determined, in an effort to mitigate the unfairness to the defendant of one-way intervention on the peculiar facts of that case. *Id.* at 1383-84. Not only did that court permit adjudication of the rights of absent class members without certification or notice, but it tried to cure the one-way intervention by requiring a faulty notice. No circumstances permit a trial court and class counsel intentionally to omit material information – the fact that class claims have been resolved – in the very notice that is supposed to provide class members the information on which to make important decisions about their interests.

The other case, *Schwarzschild v. Tse*, 69 F.3d 293 (9th Cir. 1995), refused to compel notice to absent class members of an adverse decision on the merits when the

defendant had prevailed on a motion for summary judgment after class certification but before notice. That court held the defendant "effectively waived [the] right to have notice circulated to the class." *Id.* at 297. Even though the *Schwarzschild* case raised no issue of one-way intervention and did no harm to the due process interests of absent class members, the majority opinion relied on *Postow* for the proposition that "a defendant waives his right to have notice sent to the class under Rule 23(c)(2) whenever he moves for summary judgment *before* the class has been properly certified and notified." *Id.* at 297 (emphasis in original).

*Postow* irreconcilably conflicts with a decision of the Seventh Circuit, *Peritz v. Liberty Loan Corp.*, 523 F.2d 349 (1975). *Peritz* reversed a decision to certify a class after a decision on the merits in favor of the class. That court relied on Rule 23(c) and this Court's opinions in *Eisen* and *American Pipe* to rule that "amended Rule 23 requires class certification prior to a determination of the merits." 523 F.2d at 353. It noted "that the class members in a 23(b)(3) class action are to be notified early enough to allow voluntary exclusion prior to 'judgment' and also early enough to allow for effective appearance by counsel." *Id.* at 354. *Postow* recognized its conflict with *Peritz*, 627 F.2d at 1381. *Postow* rejected *Peritz* based on a strained interpretation of this Court's decision in *Eisen*: "Despite its rhetoric, the Eisen Court itself was thus not unduly concerned about class members joining after learning of the trial judge's view of the merits." *Id.*

Recently, the conflict between *Postow* and *Peritz* led the First Circuit to suggest that "[w]hether a class should ever be certified after judgment on the merits can be debated." *Kerkhoff v. MCI Worldcom, Inc.*, 282 F.3d 44, 54 (1st Cir.

2002) (citing *Postow* and *Peritz*). Actually, this Court's due process discussions and the 1966 revisions to Rule 23 leave no room for debate on the point. If the problem of one-way intervention is to be avoided, then class certification and notice must precede a ruling on the merits in favor of the class. But until the timing holding of *Postow* is expressly rejected, other courts will rely on it, as the Arkansas courts did here, and the possibility of one-way intervention will remain.

**The Issues of Timing and Notice.** The timing question – when a court should certify a class in relation to pending dispositive motions – is a question of procedure that does not involve the due process issue of notice to absent class members after class certification but before their claims are determined. The lower courts in this case entangled the timing issues with the notice issue because the trial court certified the class and granted judgment to the class on the same day, before providing any form of notice to absent class members. The Arkansas Supreme Court affirmed this result, even though it limited the determination of the merits simply to the question of liability. As a result, NEI is exposed to the one-way intervention that the 1966 amendments to the rules of procedure were designed to avoid, and absent class members have received an adjudication of their claims without their knowledge.

The timing issues are subject to traditional waiver doctrine. For instance, if a defendant in a putative class action moves to dismiss the complaint or seeks summary judgment before class certification, then a ruling in favor of the defendant would be binding only as to the named plaintiffs, and the ruling would not bind absent members of the putative class. This is the "risk" or "waiver" that a defendant, like

NEI, assumes in filing a dispositive motion before certification. The holding in *Schwarzschild* is limited to this point. On the other hand, a putative class representative who files a dispositive motion before class certification runs headlong into the problem of one-way intervention, because a favorable ruling before class certification would permit absent class members to receive notice of the favorable ruling and then decide whether to take advantage of it, but they could avoid the preclusive effects of a negative ruling. NEI raised precisely this issue in the trial court and before the Arkansas Supreme Court.

The notice issues, by contrast, are due process rights of absent class members once a trial court decides to certify a class action. At that point, absent class members have a stake in the litigation, and due process requires adequate notice in the circumstances to give them material information on which to decide how they wish to control their own interests in that litigation. In this case, the question of notice to absent class members arose only when the trial court, in a single day, granted class certification and judgment in favor of the certified class without notice to absent class members. Both lower courts found the due process rights of absent class members were waived. This Court has never addressed the waiver of the absent class members' rights to due process.

**The Proper Waiver Analysis.** The prerequisite for a waiver of a constitutional right is a knowing and voluntary act of the person who has the constitutional right. Perhaps the most startling implication of the erroneous decision here based upon *Postow* and *Schwarzschild* is that an absent class member can "waive" his or her right to notice of litigation without even knowing of the existence of the lawsuit. A party may by contract waive subsequent due process rights to notice

and an opportunity to be heard. *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964). A litigant may even sign an agreement for consideration that permits an adversary later to enter an appearance for the litigant in a disputed matter and consent to entry of a judgment. *D. H. Overmyer Co. Inc. v. Frick Co.*, 405 U.S. 174 (1972). However, in these cases, the party who waived the due process rights or authorized someone to act in his or her place knew that he or she was making the waiver or authorization.

In the case below, by contrast, the absent class members had no notice of the litigation in Garland County Circuit Court in 2004. Even without defining the precise contours of the doctrine of waiver of the due process rights of absent class members, this Court should rule that the actions of an adverse party who has no agreement or authorization to act for the waiving party cannot waive these constitutional rights.

Indeed, in *Mullane* this Court suggested that an adverse party in litigation cannot receive notice on behalf of a litigant or waive the due process right to notice on behalf of a litigant. There the resident trustee who sought approval of an annual accounting in order to bind absent trust beneficiaries was required to provide the best practicable notice to those beneficiaries under the due process clause notwithstanding the trust relationship. This was because there was a potential conflict between the interests of the resident trustee and the absent beneficiaries with regard to the trust accounting. Using the analysis of *D. H. Overmyer* and *Szukhent*, the absent beneficiaries might have been able to authorize the resident trustee later to accept service or to waive notice on their behalf based on a valid and voluntary agreement. But there is no such basis to argue that NEI in this case, or any defendant in a legitimate Rule 23(b)(3) class action, may

waive the rights of absent plaintiff class members to notice or an opportunity to control litigation with respect to their property or interests.

This Court should rule unequivocally that a class action defendant cannot waive the rights of absent class members to notice or an opportunity to opt out of the action. This Court should reject *Postow* and *Schwarzschild* as precedent for the proposition that a defendant in a 23(b)(3) class action can take any act that might waive or defeat the rights of absent class plaintiffs to receive adequate notice once the class is certified and before the merits are determined.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE SUPREME COURT OF ARKANSAS DELIVERED JULY 1, 2005, SUBSTITUTED OPINION ON DENIAL OF REHEARING ISSUED SEPTEMBER 15, 2005**

**SUPREME COURT OF ARKANSAS**

No. 04-646

NATIONAL ENTERPRISES, INC.
AND ARKANSAS NO. 1 LLC,

APPELLANTS,

VS.

DONALD D. KESSLER AND MARY L. KESSLER, ET AL.
on their own behalf and on behalf of
others similarly situated,

APPELLEES.

Opinion Delivered: July 1, 2005

APPEAL FROM THE GARLAND COUNTY
CIRCUIT COURT,
NO. 96-1637-11,
HON. VICKI S. COOK, JUDGE,

AFFIRMED IN PART;
REVERSED AND REMANDED IN PART.

MOTION TO LIMIT THE RECORD OR, ALTERNATIVELY, FOR ATTORNEY'S FEES AND COSTS DENIED.

SUBSTITUTED OPINION ON DENIAL
OF REHEARING.

*Appendix A*

ROBERT L. BROWN, Associate Justice

This case involves a time-share development located in Hot Springs known as the Lakeshore Resort and Yacht Club. The appellants in this case are National Enterprises, Inc., and Arkansas No. 1 LLC, which are allegedly the successors-in-interest to the original developer of the Lakeshore condominiums. Hereinafter, the appellants will jointly be referred to as National Enterprises. The appellees are Donald D. Kessler and others (jointly referred to as Owners), who are the owners of the Lakeshore condominiums and who brought a class-action suit against National Enterprises. In that suit, the Owners sought restitution and rescission of their purchase contracts and raised claims of misrepresentation and breach of contract. The circuit court certified the class and on that same date granted summary judgment in favor of the Owners and against National Enterprises on issues involving liability and damages. We affirm that grant of summary judgment in part and reverse and remand in part.

The history of this case is taken largely from the Joint Statement of Undisputed Facts (Joint Statement) filed by the parties in federal district court on October 21, 1999. That Joint Statement was attached as an exhibit to the Owners' Response to National Enterprises's Motion to Dismiss or for Summary Judgment and Counter-Motion for Summary Judgment, which was filed in circuit court on January 7, 2004.

In 1983, Painter's Point Development Company Limited Partnership mortgaged a parcel of land in Hot Springs to Union Planters National Bank to construct a hotel and condominium units on that property. Painter's Point built

the hotel and condominium units, and in June 1985, conveyed the property with the condominium units to the Lakeshore Resort and Yacht Club Limited Partnership (Lakeshore Partnership).

When the Lakeshore Partnership purchased the Lakeshore condominiums from Painter's Point, they entered into a written license agreement (License Agreement) under which the Owners of the condominium units on the Lakeshore property were to have use of certain amenities in the adjoining hotel and on the hotel property. On August 26, 1986, the Lakeshore Partnership conveyed the condominium property to Hansen, Hooper & Hayes, Inc. (HHH), the general partner for Lakeshore Partnership, and, on August 27, 1986, HHH executed a $2,802,000.00 promissory note and mortgage in favor of Independence Federal Bank, FSB.

On November 18, 1988, Union Planters foreclosed on its mortgage on the hotel property and a foreclosure decree was subsequently entered in favor of Union Planters on August 3, 1990. On December 24, 1990, Robert and Shannon Fewell purchased the hotel property from Union Planters and later deeded the property to Lake Hamilton Resort, Inc., an Arkansas corporation (LHR). LHR is owned by the Fewells.

In September 1991, Independence Federal Bank went into receivership. The Resolution Trust Corporation (RTC) assumed the HHH note and mortgage given for the Lakeshore condominiums from Independence Federal Bank and later entered into an arrangement with LHR for LHR to operate the condominiums. LHR collected the revenues, paid expenses, and split any remaining sum with the RTC. During

the period of this arrangement, LHR maintained a list of time-share owners, booked time-share owners into their units, provided utilities and parking to time-share owners, and ensured that they had the benefit of hotel amenities.

On August 19, 1993, RTC, as the receiver for Independence Federal Bank, filed an action in Garland County Chancery Court to foreclose on the HHH mortgage. On October 13, 1993, National Enterprises purchased the note and mortgage from RTC and was substituted as the plaintiff in the foreclosure action on the Lakeshore condominiums. On November 1, 1993, LHR wrote to National Enterprises and offered the sum of $275,000.00 to purchase the note and mortgage. The next day, National Enterprises made a written counter-proposal and offered to sell its beneficial interest in the Lakeshore Resort and Yacht Club for $1,000,000.00. By reply letter that same day, LHR pronounced the counter-proposal "totally off-base" and terminated the management agreement. By letter dated December 3, 1993, LHR informed the condominium Owners that, effective December 10, 1993, they would no longer be considered hotel guests and that their use of hotel amenities, parking facilities adjacent to the condominiums, and utilities had ended. National Enterprises purchased the property at the subsequent foreclosure sale on May 11, 1994.

On June 10, 1994, National Enterprises sued LHR to enforce the License Agreement. On August 30, 1994, the chancellor ruled that the License Agreement executed for the benefit of the owners did not survive the foreclosure decree of the hotel property entered in favor of Union Planters.

*Appendix A*

On September 18, 1995, National Enterprises transferred one hundred percent of its right, title and interest in the Lakeshore property to Arkansas No. 1 LLC, by warranty deed. Again, for ease of reference, we will continue to refer to both appellants as National Enterprises.

On November 27, 1996, this case began when the appellees, as named representatives of the Owners filed a class-action complaint against National Enterprises and sought rescission and restitution on theories of breach of contract and misrepresentation. The class size was described as "not known" but was estimated to be not less than 300 members. The alleged common issues of the class members arose because of their time-share interests as owners of condominium units at the Lakeshore Resort & Yacht Club.

On January 6, 1997, National Enterprises removed the case to federal district court based on diversity of jurisdiction. During the ensuing seven years while the case was in the federal court system, it was the subject of four opinions handed down by the Eighth Circuit Court of Appeals. *See Kessler v. National Enters., Inc.*, 347 F.3d 1076 (8th Cir.2003) (*Kessler IV*); *Kessler v. National Enters., Inc.*, 238 F.3d 1006 (8th Cir.2001) (*Kessler III*); *Kessler v. National Enters., Inc.*, 203 F.3d 1058 (8th Cir.2000) (*Kessler II ); Kessler v. National Enters. Inc.*, 165 F.3d 596 (8th Cir.1999) (*Kessler I*).

In *Kessler III*, the Eighth Circuit reversed the district court's judgment in favor of National Enterprises. The district court had determined that the property interests purchased by National Enterprises at the May, 1994 foreclosure sale

did not include the initial developer's obligations to provide utilities and access to hotel amenities and parking and that § 18-14-601 of the Arkansas Time-Share Act only referred to the transfer of the developer's obligation to perform certain record-keeping functions rather than to all obligations of the initial developer. *See Kessler III.* The Eighth Circuit reversed and concluded that the language of § 18-14-601—"Any transfer of the developer's interest in the time-share program to any third person shall be subject to the obligations of the developer"—meant what it said and that it referred to all of the original developer's obligations owed to the individual time-share owners. *See id.* The Eighth Circuit noted that its interpretation of this provision was "hardly novel" and cited decisional law from other states[1] as well as the Garland County Chancery Court's earlier holding in a separate court proceeding that National Enterprises was liable for misrepresentations of the original developer under the Arkansas Time-Share Act. *See id. See also National Enters., Inc. v. Rea*, 329 Ark. 332, 947 S.W.2d 378 (1997)(affirmed for an abstract deficiency without addressing the merits).

The Eighth Circuit also held that the Arkansas Time-Share Act's statute of limitations set out in § 18-14-403 governed the case and that the Owners' claims were timely, since they were brought within four years of the December 10, 1993 breach in the contract's requirements for the continued furnishing of services. *See id. See also* Ark.Code Ann. § 18-14-403 (1987). The Eighth Circuit finally held on

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1. *See Bell v. RDI Resort Servs. Corp.*, 637 So.2d 960 (Fla.Dist.Ct.App.1994); *State v. Heath*, 806 S.W.2d 535 (Tenn.Ct.App.1990); *Smith v. Dept. of Bus. Reg.*, 504 So.2d 1285 (Fla.Dis.Ct.App.1986).

the merits of the claim that the original developer misrepresented the Owners' right to continued access to hotel amenities and parking, and, on that basis, the Owners had an actionable claim for constructive fraud, entitling them to equitable relief in the form of partial rescission. The case was remanded to the district court for a calculation of damages.

In *Kessler IV*, both parties appealed the district court's calculation of total damages, which was $1,666,626.26. At that point, the Eighth Circuit considered National Enterprises's "belated jurisdictional challenge" on the ground that diversity jurisdiction was lacking because the class members' individual claims for actual damages did not meet the jurisdictional requirement and the total claims could not be aggregated to satisfy the minimum-amount-in-controversy requirement. The Eighth Circuit concluded that diversity jurisdiction was indeed lacking for the reason argued by National Enterprises and remanded the case to district court with directions to remand it to the state court from which it had been removed.

On December 15, 2003, National Enterprises moved in the Garland County Circuit Court to dismiss the class-action complaint or, alternatively, for summary judgment. On January 7, 2004, the Owners responded to that motion, filed a counter-motion for summary judgment, and moved for class certification. On April 19, 2004, the circuit court held a hearing on these motions. National Enterprises filed an objection to the form of the proposed judgment on April 26, 2004. On May 14, 2004, the circuit court entered an order

certifying the class.[2] At the same time on that same date, the circuit court entered a judgment that denied National Enterprises's Motion for Summary Judgment but granted the Owners' Counter-Motion, and found National Enterprises liable. Damages were awarded to the Owners in that judgment in the amount of $1,995,999.67. The court ordered that this amount be paid into the registry of the court or, alternatively, that a *supersedeas* bond be posted.

The record on appeal was lodged with the Supreme Court Clerk on June 10, 2004. On September 2, 2004, the Owners moved to supplement the record, and on September 23, 2004, this court remanded the case to the circuit court to settle the record. A supplemental record was lodged on October 21, 2004, over the objection of National Enterprises. On October 22, 2004, National Enterprises filed a Motion to Limit the Record or, Alternatively, for Attorneys' Fees and Costs Incurred in Preparation of the Original Opening Brief, Abstract, and Addendum. This court decided to submit that motion with this case.

## *I. Waiver of Notice*

We turn then to the issues raised in this appeal. We initially consider the entry of summary judgment in favor of the Owners before notice of class certification was given. The question that concerns us is whether it was error for the circuit court to consider the merits of the case in deciding

2. The propriety of class certification is not an issue in this appeal, although National Enterprises does raise the precise number of class members as a material issue of fact that is unresolved, which it claims would make summary judgment inappropriate.

liability issues before the prospective class members were notified pursuant to Arkansas Rule of Civil Procedure 23. We conclude that it was not error.

In *Speights v. Stewart Title Guar. Co., Inc.*, __ Ark. __, __, __ S.W.3d __, __ (June 17, 2004), we said:

> In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Supreme Court forbade any inquiry into the merits of the class action before a class had been certified and the class members had been notified.
>
> . . .
>
> We agree with the Supreme Court's rationale set out in *Eisen* and conclude that the trial court in the case here erred when it undertook to adjudicate the merits of the class action before determining its appropriateness as a class action and before determining the composition of the class.

Thus, we concluded that a merits determination on a Rule 12(b)(6) motion should not transpire before the prospective class members were notified and the class composition determined.[3]

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3. We subsequently handed down a supplemental opinion in the *Speights* case. *See Speights v. Stewart Title Guar. Co., Inc.*, __ Ark. __, __ S.W.3d __ (Sept. 30, 2004). There, we clarified that Rule 12(b)(6) motions *are proper* prior to class certification. We observed that such non-merits determinations are only binding on the named parties and, therefore, are less likely to prejudice unfairly either the unnamed members of the potential class or the defendants to the action. Because such motions promote the administration of justice and will not unfairly prejudice the parties to the action, we held them appropriate prior to class certification.

In the instant case, unlike *Speights*, we are confronted with the issue of a merits decision before notice is given to the class. The notice provisions in our Rule 23 dealing with class actions require that the "best notice practicable" be given to members of the class. Ark. R. Civ. P. 23(c) (2005). Rule 23(c) then prescribes what shall comprise that notice:

> The notice shall: (1) describe the action and the members' rights in it; (2) advise each member that the court will exclude the member from the class if the member so requests by a specified date; (3) advise each member that the judgment, whether favorable or not, will include all members who do not request exclusion; and (4) state that any member who does not request exclusion may, if the member desires, participate in the litigation, either in person or through counsel.

Notice is designed to provide class members with the ability to opt out of the class before liability is resolved and damages determined and protects defendants from a multiplicity of suits from individual class members. Here, however, National Enterprises moved for summary judgment on liability issues before notice was given to the class. Specifically, on December 15, 2003, National Enterprises moved, pre-notice, to dismiss the class action or, alternatively, for summary judgment on the liability issues of alleged breach of contract and misrepresentation by the original developer. The Owners filed their counter-motion for summary judgment on January 7, 2004. This chronology raises the question of whether National Enterprises made a strategic decision and, in doing so, waived its right to contest

the failure to give notice, when it moved for summary judgment. *See, e.g., Schwarzschild v. Tse*, 69 F.3d 293 (9th Cir.1995) (by obtaining summary judgment before the class has been certified and notice sent, defendants waived any right to compel plaintiff to notify the class of the pending action). The Owners do not raise the issue of failure to give notice, but, of course, it was the Owners, who were granted summary judgment.

We conclude that National Enterprises waived the notice issue. Though Arkansas has no specific authority on this point, federal case law is significant. *See, e.g. Swartzchild, supra*; *Postow v. OBA Fed. Sav. and Loan Ass'n*, 627 F.2d 1370, 1380-85 (D.C.Cir.1980) (held no error where final designation of class and sending of notice to members occurred after trial court denied defendant's summary-judgment motion and later granted plaintiff's summary-judgment motion). Moreover, we do not view the fact that National Enterprises was unsuccessful in its summary-judgment motion as decisive, as National Enterprises contends. It would make little sense for a defendant to move for summary judgment on liability issues before notice, lose on that motion, and then argue that the court's judgment violated notice requirements. We, therefore, hold that National Enterprises's motion for summary judgment on liability issues prior to class notice waives the mandate that notice be given under Rule 23(c).

*Appendix A*

*II. Liability Issues*

We turn then to the liability issues, which involve statutory interpretation. National Enterprises contends that summary judgment was error because the circuit court erroneously interpreted the Arkansas Time-Share Act to hold National Enterprises, a condominium owner, liable to other condominium owners for misrepresentation or constructive fraud. That liability, according to National Enterprises, should only be found against the original developer. This argument is not persuasive.

The statute at issue reads:

> In the financing of a time-share program, the developer shall retain financial records of the schedule of payments required to be made and the payments made to any person or entity which is the lienholder of any underlying blanket mortgage, deed of trust, contract of sale or other lien or encumbrance. Any transfer of the developer's interest in the time-share program to any third person shall be subject to the obligations of the developer.

Ark.Code Ann. § 18-14-601 (Repl.2003).

National Enterprises claims that the second sentence of this two-sentence statute only imposes upon the transferee of the original developer's interest in the time-share program the obligation of record keeping that is described in the first sentence of the statute. The *amicus curiae* brief filed by the

American Resort Development Association supports this construction urged by National Enterprises.

There is no question but that National Enterprises was a successor-in-interest to HHH, the general partner of the Lakeshore Partnership, after buying the note and mortgage from HHH on the Lakeshore property. Indeed, the Joint Statement makes it clear that this is undisputed by the parties. But, more importantly, we view *§ 18-14-601* to be very clear on the point of National Enterprises's obligations. The second sentence of the statute reads that *any* transfer of the developer's interest to *any* third person shall be subject to the obligations of the developer. Giving the words of this statute their plain meaning, as we are required to do, the statute appears unambiguous and it conveys a clear and definite meaning. *See Slusser v. Farm Serv., Inc.*, __ Ark. __, __ S.W.3d __ (Nov. 11, 2004). That meaning is that National Enterprises succeeds to the obligations of the initial developer, and we so hold.

Our statutory interpretation in this regard is bolstered by the analysis undertaken by the Eighth Circuit Court of Appeals in *Kessler III*. In that opinion, the Eighth Circuit noted: "the overriding purpose of the Time-Share Act is to protect consumers." *Kessler III*, 238 F.3d at 1013. We agree that § 18-14-601 adheres to that creed by assuring that the original developer's obligations to the Owners are not abandoned.

National Enterprises also argues that the grant of summary judgment was in error because the Owners' constructive fraud claim is barred by the statute of limitations.

*Appendix A*

The circuit court determined that the Arkansas Time-Share Act's statute of limitation governs this action, citing *Shelton v. Fiser*, 340 Ark. 89, 8 S.W .3d 557 (2000), for the principle that a general statute must yield to a specific statute. The Time-Share Act's limitations statute provides:

> A judicial proceeding in which the accuracy of the public offering statement or validity of any contract of purchase is in issue and a rescission of the contract or damages is sought must be commenced within four (4) years after the date of the contract of purchase, notwithstanding that the purchaser's terms of payments may extend beyond the period of limitation. However, with respect to the enforcement of provisions in the contract of purchase which require the continued furnishing of services and the reciprocal payments to be made by the purchaser, the period of bringing a judicial proceeding will continue for a period of four (4) years for each breach, but the parties may agree to reduce the period of limitation to not less than two (2) years.

Ark.Code Ann. § 18-14-403 (Repl.2003).

The circuit court's summary judgment applies the second sentence of the Arkansas Time Share Act's four-year statute of limitations to the instant case. That second sentence concerns actions to enforce purchase contract provisions requiring the continued furnishing of services and reciprocal payments by the purchaser. The circuit court concluded that the Owners' complaint was timely, because it was filed on

November 27, 1996, within four years of the date when LHR terminated its agreement to provide amenities, parking, and utilities to Owners on December 10, 1993.

National Enterprises urges that the circuit court found liability based on the developer's acts of misrepresentation and constructive fraud when it induced time-share purchases, in part, by promises of permanent access to the hotel's amenities, parking, and utilities. Therefore, it argues that the appropriate statute of limitations is the general three-year limitation pursuant to Ark.Code Ann. § 16-56-105 (1987), which governs fraud actions. As characterized by National Enterprises in its brief, the wrong done by the developer was "the then-existing but otherwise unknown alleged flaw in the irrevocable license agreement," for which the limitation period, absent concealment, began in 1985 or 1986 at the time Owners purchased their time-share contracts.

We affirm the circuit court and hold that the specific statute under the Time-Share Act (§ 18-14-403) controls as opposed to the general limitations statute (§ 16-56-105). Had we adopted National Enterprises's argument, this would have terminated the Owners' right to seek relief before any injury was known to them. This is certainly contrary to the General Assembly's intention to protect consumers under the Act.

### *III. Notice and Damages*

Though we have decided that liability issues could be resolved before notice to the class members due to National Enterprises's waiver, we conclude that a Rule 23(c) notice is now appropriate to class members under the direction of the circuit court. Accordingly, we remand this case for that purpose.

*Appendix A*

Following notice, a determination of individual defenses and damages of the resulting class members will be necessary by the circuit court. As we have said in several cases, the circuit court will now have to determine whether individual claims of class members will be splintered for a decision on particularized defenses raised by National Enterprises such as abandonment of claims and the amount of damages owed to individual Owners. *See, e.g., Seeco, Inc. v. Hales*, 330 Ark. 402, 954 S.W.2d 234 (1997); *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991).

*IV. Federal Evidence*

We do take this opportunity to resolve one issue that is certain to recur on remand for a determination of damages, which is whether the circuit court may examine evidence taken in federal district court from 1997 to 2003 for purposes of deciding this case. We conclude that it can under the facts of this case.

National Enterprises contends that all that occurred in federal district court for that seven-year period became void upon remand to Garland County Circuit Court and that it was as if the federal court proceedings never occurred. National Enterprises's argument is founded on the principle that "after remand from federal court, a case stands as if it had never been removed from state court, and what happened in federal court has no bearing on the proceeding in state court." *NCS Healthcare of Arkansas, Inc. v. W.P. Malone, Inc.*, 350 Ark. 520, 527, 88 S.W.3d 852, 856 (2002), *accord Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 335, 900 S.W.2d 955, 958 (1995) ("[R]egardless of what took

place in federal court, the state proceedings essentially 'picked up where they left off,' which was just after Standridge filed its motion to dismiss."); *Trinity Universal Ins. Co. v. Robinson*, 227 Ark. 482, 485-86, 299 S.W.2d 833, 836 (1957) ("The general rule is that when a case is removed to the Federal Court and remanded, it stands in the State Court in the same position in which it would have been had it never been removed."); *Meyers Store Co. v. Armstrong*, 187 Ark. 636, 61 S.W.2d 440, 441 (1933) ("When a case has been remanded from federal court, it is the duty of the state court to proceed as though no removal had ever been attempted.").

However, consistent with this authority, the record shows that the remanded case resumed in Garland County Circuit Court in 2003 as if the 1996 complaint had just been filed in that court. National Enterprises, though, objects to the circuit court's reliance on the federal opinions (*Kessler I*, *Kessler II*, *Kessler III*, *Kessler IV*) rendered in this case, and on the evidence that was developed and filed in those proceedings. Particularly, they object to the evidence that became the supplemental record in this appeal.

On remand from this court to the circuit court "to settle the record," the Garland County Circuit Court entered its order on October 7, 2004, and itemized the supplemental record materials, all of which derive from the federal litigation, as follows: (a) Memorandum Opinion and Order (entered September 29, 1997, by Hon. Jimm Larry Hendren),[4] (b) Exhibits to Joint Statement of Undisputed Facts,

4. The document is actually file stamped September 23, 1997 by the federal district court.

(c) Plaintiffs' First Amended and Substituted Motion for Entry of Judgment and Award of Notice of Judgment in Class Action,[5] (d) Plaintiffs' Reply to Defendants' Response to Plaintiffs' First Amended and Substituted Motion for Entry of Judgment and Approval of Notice of Judgment in Class Action, (e) Answer of Defendants, and (f) Judgment (entered September 23, 2002, by Hon. Jimm Larry Hendren). On October 21, 2004, the Owners supplemented the record on appeal by lodging these materials, as contained in four large 3- ring binders, a single volume, and a single envelope, with this court.

The bulk of the supplemental record materials is contained in the four binders and consists of backup documentation to two documents—the Joint Statement of Undisputed Facts, and a document entitled "Time-Share Owners Master Damages Spreadsheet as of 9/27/2001." As noted above, the Joint Statement was also an appended exhibit to the Owners' Counter-Motion for Summary Judgment in the circuit court, as was a document entitled "Time-Share Owners Master Damages Spreadsheet as of 12/22/2003," which appears to be an updated version of the 2001 spreadsheet.

On October 22, 2004, National Enterprises filed its Motion to Limit the Record, or, Alternatively, for Attorneys' Fees and Costs Incurred in the Preparation of the Original Opening Brief, Abstract, and Addendum, on the ground that the supplemental record materials were not part of the record

5. The document is actually entitled "Plaintiffs' First Amended and Substituted Motion for Entry of Judgment and Approval of Notice of Judgment in Class Action."

below on the date of the April 19, 2004 hearing, or the entry of the May 14, 2004 order and judgment, which are now on appeal. The motion was docketed as "PASSED UNTIL CASE SUBMITTED" and is now considered with the appeal. We note in this regard that it is undisputed that the supplemental record materials were in the circuit court clerk's office on April 19, 2004, at the time the circuit court conducted its motion hearing.

We disagree with National Enterprises that the evidence in these supplemental record materials cannot be considered by the circuit court in deciding the individual damage claims. The authority cited by National Enterprises precludes the use of federal *pleadings* in the remanded state-court proceeding but does not address the use of *evidence* that was developed in the federal action in the state-court proceeding. With respect to that evidence, we conclude that these supplemental record materials can be properly considered by the circuit court when filed in that court.

It is somewhat unclear to this court whether these supplemental materials were actually identified as exhibits to the Owners' Response to Motion to Dismiss or for Summary Judgment and Counter Motion for Summary Judgment so as to be considered by the circuit court in the damage calculations in its May 14, 2004 judgment. Regardless, because we are reversing and remanding the damages portion of this case, we have no doubt that this question will be moot after a proper filing of these materials.

*Appendix A*

Because we reverse the damages awarded to the class members due to a lack of notice to the class, we further reverse the circuit court's order directing National Enterprises to pay $1,995,999.67 into the registry of the court.

The motion to limit the record or, alternatively, for attorney's fees and costs is denied.

Affirmed in part. Reversed and remanded in part.

## APPENDIX B — ORDER ON CLASS CERTIFICATION OF THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS FILED MAY 14, 2004

## IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS

No. 96-1637J

DONALD D. KESSLER and MARY L. KESSLER, his wife, WILLIAM L. MARTIN and ANITA M. MARTIN, his wife, JAMES W. WALLACE and DORIS F. WALLACE, his wife, and CARROLL W. BROCKWELL and M. CATHRYN BROCKWELL, his wife, on their own behalf and on behalf of all others similarly situated

PLAINTIFFS

v.

NATIONAL ENTERPRISES, INC. and ARKANSAS NO. 1 LLC

DEFENDANTS

## ORDER

On this 19th day of April, 2004 comes for consideration Plaintiffs' Motion for Class Certification, the parties appearing by and through their counsel, and the court, being well and sufficiently advised, finds and orders as follows:

1. Plaintiffs filed a Class Action Complaint in the Garland County Circuit Court on November 27, 1996 against

*Appendix B*

Defendants National Enterprises, Inc. and Arkansas No. 1 LLC. Defendants removed the action to the United States District Court for the Western District of Arkansas on January 6, 1997, pursuant to 28 U.S.C. § 1446(b). Plaintiffs moved to certify the class in the federal court action and, by order entered September 23, 1997, the federal district court certified the case as a class action. A notice of the pendency of the class action case was subsequently sent to all known class members. After litigating the case in federal court for nearly seven full years, the federal district court remanded the action to this court after the Eighth Circuit concluded that the federal court did not have subject matter jurisdiction under 28 U.S.C. § 1332. *Kessler v. Nat'l Enters., Inc.*, 347 F.3d 1076 (8th Cir. 2003).

2. Plaintiffs' complaint alleges, *inter alia*:

(a) that they are owners of a time-share condominium unit at the Lakeshore Resort & Yacht Club ("Lakeshore") and that this property constitutes a "time-share estate" under Arkansas law. *See* ARK. CODE ANN. § 18-14-102(13) (1987);

(b) that Defendants are the owners of the "time-share project" which is subject to a "time-share program" under Arkansas law. *See* ARK. CODE ANN. §§ 18-14-101, *et seq.*;

(c) that they purchased time-share estates upon the developer's express representation that they would be provided utilities, parking, easements, recreational facilities, time-share exchanges, and other amenities in connection with the time-share estate;

(d) that these amenities were expressly part of their application for registration of the time-share program;

(e) that when Defendants purchased the time-share project, they purchased, under Arkansas law, the developer's obligations to the time-share owners. *See* ARK. CODE ANN. § 18-14-601; and

(f) that Defendants are liable for constructive fraud for failing to fulfill the developer's obligations to the time-share owners.

3. Plaintiffs seek the equitable remedy of rescission; return of their purchase price with interest; and recovery of out-of-pocket expenses, attorneys' fees, courts costs and pre-judgment interest.

4. Defendants have denied Plaintiffs' allegations.

5. In Plaintiffs' Motion for Class Certification, Plaintiffs assert that the class should be certified to include all persons who purchased time-share condominium units at Lakeshore during the period from on or about June 28, 1985, to on or about April 12, 1994. Plaintiffs further state that the Defendants herein, as well as any corporation, partnership, trust, or other entity in which any Defendant has a controlling interest or subsidiaries thereof and/or the legal representatives, heirs, successors or assigns of any such excluded party, should not be included in any such class.

6. Plaintiffs also request in their motion that they be appointed to be the class representatives of any such class so designated.

7. Plaintiffs assert that all of the requirements of ARK. R. CIV. P. 23 have been met since: (a) the proposed class exceeds 200 persons and is therefore so numerous that joinder of all members of the class is impracticable; (b) there are questions of law and fact common to all proposed class members; (c) the claims of the proposed class representatives are typical of the claims of the proposed class members; (d) the proposed class representatives will fairly and adequately protect the interests of the proposed class members; (e) the common questions of law and fact predominate over individual claims; and (f) the class action is the superior method for resolving this controversy.

8. Defendants contend that they should not be excluded from the class of time-share owners, since Defendants became owners of 80% of the time-shares in May, 1994. Defendants allege that their damages are identical in nature to the damages sustained by the class members Plaintiffs seek to represent. Defendants further contend that the Motion for Class Certification should be denied because Plaintiffs failed to state facts upon which relief may be granted pursuant to ARK. R. CIV. P. 12(b)(6); that an actual controversy does not exist; that Plaintiffs do not have standing and have not been injured; that Plaintiffs' action is barred by the statute of limitations; and that Plaintiffs' claims are barred by 12 U.S.C. § 1823(e).

9. The instant case clearly satisfies the requirements of Rule 23 of the Arkansas Rules of Civil Procedure, which identifies four requirements which must be established before any action may be maintained as a class action:

*Appendix B*

> (a) *Prerequisites to Class Action.* On or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to meeting the requirements of Rule 23(a), a plaintiff must also establish that the action satisfies the requirements of one provision of Rule 23(b). Here, Plaintiffs meet the requirements of Rule 23(b), which provides in pertinent part as follows:

> (b) *Class Actions Maintainable. . . .*
>
> [T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

ARK. R. CIV. P. 23(b). As discussed below, the proposed class satisfies both Rule 23(a) and Rule 23(b).

10. Rule 23(a)(1) requires that the class be so numerous that the joinder of all class members is impracticable. Impracticability does not mean impossibility, only difficulty

or inconvenience of joining all members of the class. *United States Fidelity & Guaranty Co. v. Lord,* 585 F.2d 860, 870 (8th Cir. 1978) *cert. denied,* 440 U.S. 193 (1979); *Chutich v. Green Tree Acceptance, Inc.,* [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,237 at 96,048 (D. Minn. 1990); *Jensen v. Continental Financial Corp.,* 404 F. Supp. 806, 809 (D. Minn. 1975); *Vernon J. Rockler & Co. v. Graphic Enterprises, Inc.,* 52 F.R.D. 335, 339 (D. Minn. 1971). The precise number of class members need not be known for certification of the class. Precise enumeration of the members of the class is not necessary for the named plaintiff to proceed as a representative of the class. *Biben v. Card,* [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,462, 92,825 (W.D. Mo. 1986).

11. The number of persons who own time-share condominiums in Lakeshore is believed to exceed some 200 persons. *See* Complaint, ¶ 8. A copy of a document containing a list of time-share owners, produced by Defendants in discovery in the federal court litigation, was attached to the complaint. A class of this size easily satisfies the requirements that joinder under the Arkansas Rules of Civil Procedure is impracticable, and classes of this size or smaller are routinely certified by the courts.

12. The Eighth Circuit has previously approved certification of a class of 20 persons. *See Arkansas Education Association v. Board of Education,* 446 F.2d 763 (8th Cir. 1971). In *Gentry v. C&D Oil Co.,* 102 F.R.D. 490 (W.D. Ark. 1984), an 81 member class was certified. *See also In re Itel Securities Litigation,* 89 F.R.D. 104 (N.D. Cal. 1981) ("Where number of class members exceeds 40, and

particularly where class members number in excess of one hundred, the numerosity requirement will generally be found to be met."); *Moorhead v. Merrill Lynch, Pierce, Fenner & Smith,* [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,448 (D. Minn. 1989) (1,300 bondholders). *In re Endotronics,* [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,664 (D. Minn. 1988) (hundreds and probably thousands of stock purchasers); *Dirks v. Clayton Brokerage Co.,* 105 F.R.D. 125, 131 (D. Minn. 1985) (902 investors); *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.,* 88 F.R.D. 38 (S.D.N.Y. 1980) (87 debenture holders); *In re Diasonics Sec. Litig.,* 599 F. Supp. 447, 451 (N.D. Cal. 1984) (hundreds of class members); *Biben, supra* (2 million shares of stock traded); *Metge v. Baehler,* 77 F.R.D. 470 (S.D. Iowa 1978) (635 purchasers). A class action was found to be appropriate when class members were as few as thirty-six. *MacNeal v. Columbine Exploration Corp.,* 123 F.R.D. 181 (E.D. Pa. 1988).

13. Professor Newberg's survey of court rulings on the numerosity issue concludes that any class consisting of 40 or more members presumptively fulfills the numerosity requirement. 2 H. Newberg, *Newberg on Class Actions* § 3.05 (2d Ed. 1985). Where there is a large, dispersed number of class members, as is present in the instant case, the numerosity requirement of Rule 23(a)(1) is easily met. *See Zeidman v. J. Ray McDermott & Co.,* 651 F.2d 1030, 1039 (5th Cir. 1981) (numerosity requirement may be assumed to have been met in class actions involving nationally traded securities).

14. Finally, the geographic location and diversity of potential members of a class is an important factor to be

considered in determining whether the numerosity requirement has been met and has even been called the primary factor in making a numerosity determination. *Gentry v. C&D Oil Co.*, 102 F.R.D. 490 (W.D. Ark. 1984); and *Glover v. Murray*, 361 F. Supp. 235 (S.R.N.Y. 1973). Here, time-share owners are known to reside in numerous states (Arkansas, Oklahoma, Louisiana, Mississippi, Texas, Washington, Oregon, Illinois, Indiana, Kansas, Arizona, New Mexico, New York, Florida, North Dakota, Tennessee, Missouri, Nebraska, Wisconsin, North Carolina, Minnesota and Iowa) and Canada.

15. Subsection (2) of Rule 23(a) requires that questions of law or fact must be common among class members. "The rule does not require that every question of law or fact be common to every member of the class and may be satisfied, for example, where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Paxton v. Union Nat. Bank*, 688 F.2d 552, 561 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983). Common questions exist when there is present a common nucleus of operative facts. *United States Fidelity, supra*, at 872; *Chutich, supra* (commonality found when the cumulative or interrelated misstatements have the tendency to mislead investors as to securities value); *Pell v. Speiser*, 97 F.R.D. 657 (E.D. Pa. 1983); *BNL Equities Corp. v. Pearson*, 340 Ark. 351, 10 S.W.2d 838 (2000) (resolution of common question of misrepresentation predominated).

16. Plaintiffs must show only that other members of the class have the same or similar grievances. *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir.), *cert. denied*, 434

U.S. 856 (1977); *Dirks, supra,* 132-33; *Moorhead, supra,* at 92,880-92,881; *Diasonics, supra* at 451; *Blackie, supra,* at 902; *Harris, supra,* at *914; In re Endotronics, supra,* at 98,046. "Factual differences are not fatal if common questions of law exist." *Gentry, supra,* at 493 (citing *Like v. Carfer,* 448 F.2d 798 (8th Cir. 1971)

17. Some of the predominant common questions of law and fact presented by the Plaintiffs' allegations are:

(a) Whether Plaintiffs' decision to purchase their time-share estate was based upon express representations made by Hansen, Hooper and Hays, Inc., the developer of the time-share condominiums;

(b) Whether Plaintiffs are entitled to recover from Defendants because Defendants have become liable for the developer's obligations pursuant to ARK. CODE ANN. § 18-14-601;

(c) Whether Plaintiffs would have purchased the time-share estate had they known that certain rights, privileges and amenities would not have been available to them;

(d) Whether the unavailability of certain rights, privileges and amenities has rendered the time-share estate worthless for the purposes for which it was purchased, and indeed for any purpose;

(e) Whether Plaintiffs have an adequate remedy at law; and

(f) Whether Plaintiffs are entitled to equitable rescission of their purchase of the time-share estate and a refund of their purchase price, interest paid on their note, out of pocket costs, attorneys' fees, court costs, and pre- and post judgment interest.

18. The issues referenced above are quintessential examples of those which have been found to present "common questions" of law and fact, requiring class certification, in that they involve a common scheme of deception or misrepresentation, and a failure to fulfill a statutorily-imposed requirement to assume the obligations of the original developer. *See Pabon v. McIntosh,* 546 F. Supp. 1328 (E.D. Pa. 1982) (broad based allegation of civil rights violations); *Planned Parenthood Federation, Inc.,* 559 F. Supp. 658 (D.C. Dist. Col. 1983) (lawfulness of federal regulation); *Steiner v. Equimark Corp.,* 96 F.R.D. 603 (W.D. Pa. 1983) (common scheme of deception).

19. Where substantial questions of law or fact are common to all members of a class, it is not necessary that all such members be identically situated. *Jenson v. Continental Financial Corp.,* 404 F. Supp. 806 (D.C. Minn. 1975). The mere presence of potential individual factual or legal issues or variances in class members' positions as to the common issues do not defeat commonality. *McFarland v. Memorex Corp.* 96 F.R.D. 357 (N.D. Cal. 1982). The fact that the issue of restitution in an action is not identical as to each member of the class is not a ground for the denial of class certification because of a lack of commonality. *Samuel v. University of Pittsburgh,* 538 F.2d 991 (3rd Cir. Pa. 1976). A class action may be based on the common claim that a

statute has been violated. *Roncker on behalf of Roncker v. Walter,* 700 F.2d 1058 (6th Cir. Ohio 1983), *cert. denied,* 464 U.S. 864, 104 S. Ct. 196, 78 L.Ed.2d 171. A fraud perpetrated on numerous persons by the use of similar misrepresentations can be an appealing situation for a class action and it may remain so despite the need, after liability is found, for separate determination of damages sought by individuals within the class. *Fox v. Prudent Resources Trust,* 69 F.R.D. 74 (E.D. Pa. 1975). Here, the Rule 23(a)(2) commonality requirement is easily satisfied.

20. Rule 23(a)(3) requires that a class representative's claims and defenses not differ significantly from the claims or defenses of the class as a whole. The Rule's requirement of typicality ensures that every class member's claim will be represented. *Piel v. National Semiconductor Corp.,* 86 F.R.D. 357, 370 (E.D. Pa. 1980), *cert. denied,* 474 U.S. 903 (1985); *Cohen v. Uniroyal, Inc.,* 77 F.R.D. 685, 691 (E.D. Pa. 1977). Typicality is established if the class members' claims arise from the same course of conduct and are based on the same legal theory. *See Schwartz v. Harp,* 108 F.R.D. 279, 282 (C.D. Cal. 1985); *Appleyard v. Wallace,* 754 F.2d 955, 958 (11th Cir. 1985); *Paxton, supra* at 561-62; *Dirks, supra* at 132-33; *Chutich, supra.* This is true even irrespective of any varying fact situations which underlie individual claims. *In re Worlds of Wonder Securities Litigation,* Fed. Sec. L. Rep. (CCH) ¶ 95,004 (N.D. Cal. 1990) (1989-90 Transfer Binder); *Abelson v. Strong,* Fed. Sec. L. Rep. (CCH) ¶ 93,365 (D. Mass. 1987) (1987 Transfer Binder).

21. Rule 23(a)(3) requires only that there be no express conflict between the representative parties and the class "over

the very issue in litigation" and that the representative's "interests are not . . . antagonistic to those of the class." *Mersay v. First Republic Corp.*, 43 F.R.D. 465, 468-69 (S.D.N.Y. 1968); *Metge, supra* at 475; *Kesler v. Hynes & Howes Real Estate, Inc.*, 66 F.R.D. 43 (S.D. Iowa 1975). This is a common-sense requirement — if typicality exists and there is no conflict with the claims of class members, the plaintiff will establish the elements which the members of the class must establish in the course of proving his own prima facie case. Here, Plaintiffs have an interest in proving the misrepresentations relied upon all members of the class, and in demonstrating Defendants' failure to fulfill the obligations imposed upon them by the Arkansas statute requiring a successor to a time-share developer to fulfill obligations owed to the time-share owners. There is no conflict or antagonism here between Plaintiffs' interests and those of absent class members.

22. All class members seek to prove Defendants' liability and to recover damages for their losses. The Plaintiffs' claims are typical of the claims of the class members, as required by Rule 23(a)(3). *United States Fidelity, supra,* at 872-73 (claims which emanate from the same legal theory are typical); *Donaldson, supra,* at 830; *Handwerger v. Ginsberg,* 519 F.2d 1339 (2d Cir. 1975); *In re United Energy Corp. Solar Power Modules Tax Shelter Investments Sec. Litig.*, 122 F.R.D. 251, 256 (C.D. Cal. 1988); *In re Caesars Palace Sec. Litig.*, 360 F. Supp. 366, 397-99 (S.D.N.Y. 1973); *Mersay, supra* at 468.

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23. Typicality does not require the representative's claims to be *identical* to those of the class members:

> "Typicality refers to the nature of the claim . . . of the class representative, and not to specific facts from which it arose or the relief sought. Accordingly, differences in the amount of damage, the size or manner of [investment] purchase, the nature of the purchaser, and even the specific document influencing the purchase will not render a claim atypical in most securities cases."

*Weinberger v. Jackson,* 102 F.R.D. at 844 (quoting 5 H. Newberg, *Newberg on Class Actions* § 8816, at 850 (1977)); *United States Fidelity & Guaranty Co.,* 585 F.2d at 873 ("The possible existence of individually distinct factual situations is unimportant for Rule 23(a)(3) does not require that the claims of the representative parties and the remaining members of the class be identical."); *Donaldson, supra,* at 830. *See also* the Missouri District Court case of *Marion Merrill Dow, Inc. Securities Litigation,* 994 U.S. Dist. LEXIS 10053 (July 18, 1994).

24. In the instant proceedings, the Plaintiffs' claims arise from the same factual and legal foundations as the claims of other members of the class. It is clear that typicality exists, that there is no antagonism or conflict between the claims of the named Plaintiffs and those of the class and that, in pursuing their own claims, the Plaintiffs will also be pursuing those of class members. The requirements of Rule 23(a)(3) are satisfied. *See United Energy,* 122 F.R.D. at 256.

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25. Pursuant to Rule 23(a)(4), plaintiffs must "fairly and adequately protect the interests of the class." To do so plaintiffs must satisfy two factors:

> (a) The plaintiffs' attorney must be qualified, experienced and generally able to conduct the proposed litigation, and
>
> (b) The plaintiffs must not have interests antagonistic to those of the class. *United States Fidelity & Guaranty Co.,* 585 F.2d at 873. *See also Sperry Rand Corp. v. Larson,* 554 F.2d 868, 873-74 n. 17 (8th Cir. 1977) *aff'd* on other grounds after remand, subnom. *Elliott v. Sperry Rand,* 680 F.2d 1225 (8th Cir. 1982); *Moorhead,* ¶ 94,448 at 92,882; *Biben,* ¶ 92,462 at 92,827; *Green v. Santa Fe Industries,* 88 F.R.D. 575, 576 (S.D.N.Y. 1980) (a conflict that would prevent a plaintiff from being a class member must be fundamental and go to the specific issues in controversy).

26. Plaintiffs here will adequately represent the class. As discussed above, Plaintiffs' interests are co-extensive and not in conflict with the interests of the class members. Their claims are typical of the claims of the other members of the proposed class. Their interests are identifiable with those of the class, and not antagonistic to them.

27. Likewise, there is no doubt that Plaintiffs' counsel are capable of prosecuting this litigation. As shown by the resumes of counsel, class counsel has extensive experience in prosecuting class actions. In class actions generally, absent

some showing to the contrary, adequacy of representation will be presumed. In *Guarantee Ins. Agency Co. v. Mid-Continental Realty Corp.*, 57 F.R.D. 555, 565-66 (N.D. Ill. 1972), the court held:

> Absent any conflict between the interests of the representative and other purchasers, and absent any indication that the representative will not aggressively conduct the litigation, fair and adequate protection of the class may be assumed.

The Plaintiffs submit that they and their counsel will fairly and adequately protect the interests of the class. In these circumstances, the requirements of Rule 23(a)(4) are met.

28. As discussed above, there are a host of common questions of law and fact as to the class. That these also predominate over individual questions as required by Rule 23(b) is shown by the fact that the alleged underlying activities of defendants affected all members of the class in the same manner. Indeed, it is impossible to discern in this case any liability issues which are not common to all members of the class. Once the common questions are resolved, all that will remain is the purely mechanical act of computing the amount of damages suffered by each class member. *See Blackie*, 524 F.2d at 905.

29. The fact that members of the class suffered damages in varying amounts does not preclude the matter from being treated as a class action. The issue of damages can be determined after the common questions have been resolved. In *Ceasars Palace*, the court stated:

> Defendants further contend that the individual questions of reliance and damages which are present in these cases present an insurmountable hurdle which, in effect, requires us to deny the class action despite the abundance of common issues which are here present. But this argument no longer has any substantial merit. . . . *See Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968); *Siegel v. Realty Equities Corp.*, 54 F.R.D. 420 (S.D.N.Y. 1972); *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969); *Kronenberg v. Hotel Governor Clinton, Inc., 41* F.R.D. 42, 45 (S.D.N.Y. 1966); (the individual questions present "no difficulties not inherent in every class action").

360 F. Supp. At 399. In *Victor Technologies,* 102 F.R.D. 53, 56 (N.D. Cal. 1984) *aff'd,* 792 F.2d 862 (9th Cir. 1986), the court held:

> The only possible distinction between class members that could be suggested arises in the amount of damages each could claim . . . [T]hese potential differences are insufficient to defeat the maintenance of a class action.

In *Blackie,* 524 F.2d at 905, the court held that "[t]he amount of damages is invariably an individual question and does not defeat class action treatment."

30. There are no significant, let along predominant, individual issues here. Questions of law and fact common to a class are likely to predominate where, as in this case,

a substantial part of the action is based on a few written documents shown to all time-share owners when the developer of the time-share estates marketed the program to members of the class as prospective purchasers. *See Unicorn Field, Inc. v. Cannon Group, Inc.*, 60, F.R.D. 217 (S.D.N.Y. 1973). Similarly, the issue of Defendants' duty to fulfill the obligations of the original developer as required by ARK. CODE. ANN. § 18-14-601.

31. ARK. R. CIV. P. 23(b) provides that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." As stated in *Seidman v. Stauffer Chem. Corp.*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,868 at 94,235 (D. Conn. 1986):

> This requirement is satisfied where a large number of persons is alleged to be injured by defendants [sic] conduct and where their claims are too small to warrant separate units.

In view of the relatively small amount of damages suffered by the individual class members, the prohibitive cost of individual litigation, and the burden individual actions would add to the judicial dockets, a class action is not merely superior to other methods of adjudicating the present controversy, it is the only viable method. As the Court of Appeals for the Second Circuit observed in *Green v. Wolf*, 406 F.2d at 301:

> [T]he alternatives [to a class action] are either no recourse for thousands of [potential class members] to whom the courthouse would thus be

> out of bounds or a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake.

(Footnote omitted). *See also Garfinkel v. Memory Metals, Inc.*, 695 F. Supp. 1397, 1405 (D. Conn. 1988).

32. The court concludes that the prerequisites of Rule 23 have been satisfied and that this matter may proceed as a class action with class members selected and/or permitted to participate pursuant to the following criteria:

> All persons who purchased time-share condominium units at Lakeshore, located on a parcel of land situated at 3501 Albert Pike Road, Hot Springs, Garland County, Arkansas, during the period from on or about June 28, 1995 to on or about April 12, 1994, except the Defendants herein; any corporation, partnership, trust or other entity in which any Defendant herein has a controlling interest or subsidiaries thereof and which any Defendant has a controlling interest; and legal representatives, heirs, successors or assigns of any such excluded party or other entity.

33. The court further concludes that the named Plaintiffs shall be the representatives of the purported class.

34. At such time as this order becomes final and non-appealable, this court will retain jurisdiction for purposes of devising a plan for notification of all purported class members

in accordance with the requirements of Rule 23 of the Arkansas Rules of Civil Procedure.

IT IS SO ORDERED.

s/ Vicki Shaw Cook
Honorable Vicki Shaw Cook

Date: May 14, 2004

## APPENDIX C — JUDGMENT OF THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS DATED AND FILED MAY 14, 2004

## IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS

No. 96-1637J

DONALD D. KESSLER and MARY L. KESSLER, his wife, WILLIAM L. MARTIN and ANITA M. MARTIN, his wife, JAMES W. WALLACE and DORIS F. WALLACE, his wife, and CARROLL W. BROCKWELL and M. CATHRYN BROCKWELL, his wife, on their own behalf and on behalf of all others similarly situated

PLAINTIFFS

v.

NATIONAL ENTERPRISES, INC. and ARKANSAS NO. 1 LLC

DEFENDANTS

## JUDGMENT

On this 19th day of April, 2004 comes for hearing Defendants' Motion to Dismiss or for Summary Judgment and Plaintiffs' Counter-Motion for Summary Judgment, the parties appearing by and through their counsel, and based upon the evidence of record, pleadings and briefs filed by the parties and argument of counsel, the court finds and orders as follows:

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1. The class action complaint in this case was originally filed in this court on November 27, 1996.

2. On January 6, 1997, Defendants National Enterprises, Inc. and Arkansas No. 1 LLC (collectively, "NEI") removed the case to the United States District Court for the Western District of Arkansas. This case was litigated in federal court for nearly seven full years. The case was dismissed by the district court on two occasions, and four separate appellate decisions were handed down by the United States Court of Appeals for the Eighth Circuit.

3. In the first appeal, the Eighth Circuit reversed the summary judgment rendered by the district court in favor of NEI, holding that Plaintiffs' claims were not barred by either the *D'Oench* doctrine articulated by the United States Supreme Court in its 1942 decision in *D 'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), or its statutory counterpart, 12 U.S.C. § 1823(e). *Kessler v. Nat'l Enters., Inc.*, 165 F.3d 596 (8th Cir. 1999) (*"Kessler I"*).

4. In the second appeal, the Eighth Circuit affirmed the district court's dismissal of a third party complaint filed by NEI against the adjacent Lake Hamilton Resort Hotel. *Kessler v. Nat'l Enters., Inc.*, 203 F.3d 1058 (8th Cir. 2000) (*"Kessler II"*).

5. In the third appeal, the Eighth Circuit again reversed the judgment of the district court in favor of NEI, ruling that NEI was liable to the Plaintiffs for the original developer's constructive fraud and Plaintiffs were entitled to a partial

equitable rescission, and remanding the case "for calculation of damages." *Kessler v. Nat'l Enters., Inc.*, 238 F.3d 1006 (8th Cir. 2001) ("*Kessler III*").

6. In the fourth and final appeal in the federal court litigation, after a judgment was entered against NEI for over $1.6 million, the Eighth Circuit again reversed, concluding that the federal court lacked jurisdiction over this matter because the class members' claims could not be aggregated and did not individually satisfy the amount in controversy requirement prescribed by 28 U.S.C. § 1332. *Kessler v. Nat'l Enters., Inc.*, 347 F.3d 1076 (8th Cir. 2003) ("*Kessler IV*"). After concluding that the federal court did not have jurisdiction in *Kessler IV*, the Eighth Circuit remanded the case to the district court with instructions to remand to this court.

## II.

## FACTUAL BACKGROUND

7. The facts underlying the claims set forth in the class complaint have not materially changed since this court's decision against these same Defendants on December 3, 1996 in *Charles P. Rea and Mickie Rea, his wife, v. National Enterprises Inc. and Arkansas No. 1 LLC*, Garland County Chancery Court No. 95-239-J, which was a case brought by plaintiffs similarly situated to the class herein based on facts virtually identical to those alleged in the class complaint in this action. In *Kessler III*, the Eighth Circuit concisely summarized this case:

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> In the mid-1980s, plaintiffs purchased time-share interests in the Lakeshore Resort & Yacht Club ("Lakeshore") in Hot Springs, Arkansas. Lakeshore is surrounded by the Lake Hamilton Resort Hotel (the "Hotel"). In December 1993, the Hotel revoked a license agreement that allowed time-share owners access to the Hotel's parking and recreational facilities, and also terminated Lakeshore's utilities.
>
> As successor to Lakeshore's developer . . . NEI unsuccessfully sued the Hotel in [Arkansas state court] to enforce the license agreement. Plaintiffs then filed the instant class action, claiming that Lakeshore's developer was obligated to provide utilities and continued access to the Hotel's parking and recreational facilities and seeking to hold NEI liable for the initial developer's obligations.

*See Kessler III* at 1007.

8. *Kessler III* went on to provide a detailed background of the facts underlying this class action, noting that the parties had stipulated to all material facts in the district court pursuant to a Joint Stipulation of Undisputed Facts agreed to by the parties which was filed of record in the district court on October 21, 1999. The Joint Stipulation was attached to Plaintiffs' summary judgment papers, was referred to by Defendants in their papers, and is a part of the record remanded by the federal court.

9. Based upon the undisputed facts and the stipulation of the parties in the district court, the proceedings this court has previously heard in the *Rea* case, and the facts and documents set forth in the summary judgment papers before this court, the material facts asserted in the class complaint are undisputed, and judgment should be entered in favor of the Plaintiffs, as set forth below.

10. Under Rule 56 of the Arkansas Rules of Civil Procedure, summary judgment is proper where it is clear that there is no issue of fact to be litigated or when the moving party is entitled to judgment as a matter of law, there is no issue as to any material fact, and even though the facts are undisputed, reasonable men could only draw one conclusion from them. *Saunders v. Nationat Old Line Ins. Co.*, 266 Ark. 247, 583 S.W.2d 58 (1979). Rule 56(c) of the Arkansas Rules of Civil Procedure further provides for the rendering of a summary judgment sought based on the pleadings. Rule 56 states that "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ARK. R. Civ. P. 56.

11. Under Arkansas law, a purchaser of property may rescind the purchase contract if the purchase was induced by constructive fraud. Constructive fraud may be found in the absence of actual fraud:

> To rescind a contract based upon fraud, it is not necessary that actual fraud exists. It is well settled

> that representations are construed to be fraudulent when made by one who either knows the assurances to be false or else not knowing the verity asserts them to be true.... *Neither actual dishonesty of purpose nor intent to deceive* is an element of constructive fraud.

*Lane v. Rachel*, 239 Ark. 400, 389 S.W.2d 621, 624 (1965) (emphasis in original); *see also South County, Inc. v. First West. Loan Co.*, 315 Ark. 722, 871 S.W.2d 325, 327 (1994) (constructive fraud is the "making of misrepresentations by one who, not knowing whether they are true or not, asserts them to be true without knowledge of their falsity and without moral guilt or evil intent"); *Cardiac Thoracic & Vascular Surgery, P.A. Profit Sharing Trust v. Bond*, 310 Ark. 798, 840 S.W.2d 188, 191 (1992).

12. The representations made by the initial developer were material. Plaintiffs would not have purchased their time-share interests without access to the Hotel amenities and parking. Further, the original developer represented that Plaintiffs would enjoy permanent access to the Hotel's parking, utilities and recreational amenities during the life of the time-share interests.

13. First, the Arkansas Real Estate Commission reviewed the public offering statement and master deed, and concluded that those documents "promised" the "use of amenities by Time-Share Interval purchasers." Second, the Commission refused to accept the Lakeshore time-share application until the license agreement referenced in the public offering statement was amended to purportedly

provide time-share owners with permanent access to the license amenities. The Commission insisted on a license agreement that was "drafted so that it will be in existence as long as the Time-Share program exists, to ensure the promised use of the amenities by Time-Share Interval purchasers." In response, the original developer provided an amended license agreement representing that it "provides for the continued use of all amenities and parking facilities of the resort by the time-share owners of Lakeshore Resort and Yacht Club." This representation was later corroborated by oral representations made to individual purchasers by the developer's sales agents. Accordingly, the developer represented to Plaintiffs that they would have permanent access to the Hotel amenities and parking.

14. Under § 18-14-601 of the Arkansas Time-Share Act, "[a]ny transfer of the developer's interest in the time-share program to any third person shall be subject to the obligations of the developer." Thus, under Section 601, NEI is liable for all obligations of the initial developer.

15. The Eighth Circuit concluded in *Kessler III* that § 18-14-601 of the Time-Share Act "means what it says." "Any transfer of the developer's interest in the time-share program to any third person shall be subject to the obligations of the developer." This law does not limit the obligations transferred in any way, much less to certain record-keeping functions. On the contrary, this provision speaks to every one of the developer's obligations owed to each individual time-share owner.

16. As the Eighth Circuit stated in *Kessler III*, this "interpretation of § 18-14-601 is hardly novel." The Eighth Circuit first referred to this court's decision in the *Rea* case, in which NEI was found liable for the constructive fraud of the original developer pursuant to section 601. The judgment in the *Rea* case was affirmed by the Arkansas Supreme Court on procedural grounds. *See Nat'l Enters., Inc. v. Rea*, 329 Ark. 332, 947 S.W.2d 378, 380 (Ark. 1997).

17. No decision by the Arkansas Supreme Court has addressed the meaning of section 601; however, this law is part of a model act adopted verbatim by several other states. *See* Iowa Code Ann. § 557A.18; Neb. Rev. Stat. § 76-1739; Tenn. Code Ann. § 66-32-127; *see also* Guam Code Ann. § 47501. As the Eighth Circuit in *Kessler III* noted, a Tennessee court has ruled on the identical issue present in this case: whether the initial developer's obligations transfer to a third party under the Time-Share Act as the result of a foreclosure sale. In *State v. Heath*, 806 S.W.2d 535 (Tenn. Ct. App. 1990), the Tennessee attorney general brought an action to prevent the foreclosure of certain unsold interests in a time-share development, unless at the time of the foreclosure sale the rights of all non-defaulting time-share purchasers were specifically recognized and preserved. *Id.* at 536-37. The *Heath* court concluded that:

> these provisions of the Act [referring to a transfer of the developer's interest] are to protect a consumer from what actually transpired in this case, i.e., foreclosure by lender that extinguishes the rights of the non-defaulting purchaser. While the statute does not forbid foreclosure, it requires

> any foreclosure to take into account the purchasers of the time-shares' interests.

*Id.* at 538. The *Heath* court noted that the intent of the legislature was to provide time-share owners a remedy against both the original developer's lender and the third party to whom the original developer's interest is transferred:

> Section 127 states that any third party to whom the developer's interest is transferred shall be subject to the developer's obligation even if, *arguendo*, the bank was not required to comply with Section 128 when the agreement was made, the bank as transferee would assume the obligations of compliance once the developer defaulted.
>
> The overriding purpose of the Time-Share Act is to protect consumers. Regulatory, civil and criminal remedies are provided. To hold that a civil remedy against a lender [or other third party transferee] is inapplicable would defeat the legislative intent. Ordinarily, a developer defaults on a note because it has no money to pay its obligation. To conclude that the legislature intended to limit the consumer's civil remedies to an action for damages against the developer under Section 128 would be a meaningless gesture.

*Id.* Section 66-32-128 of the Tennessee Time-Share Act is identical to § 18-14-602 of the Arkansas Time-Share Act.

18. *Kessler III* concluded, and this court agrees, that this case was "indistinguishable from *Heath*." *Id.* at 1013. "In both cases, the original developer defaulted, the lender foreclosed, and a third party purchased (or intended to purchase) the developer's interest at the foreclosure sale. Under the reasoning in *Heath*, § 18-14-601 mandates that NEI 'shall be subject to the obligations of the developer.'" *Id. Kessler III* noted also that this conclusion was not changed by the fact that the Master Deed envisioned that the original developer's obligations would transfer to a "Council of Co-Owners" made up of individual time-share owners, since the Council was never formed; accordingly, any third party transferee remains subject to the statutory requirements established by the Time-Share Act.

19. Moreover, Florida has included a provision in its time-share act that serves the same purpose of section 601 of the Arkansas Time-Share Act. In *Bell v. RDI Resort Servs. Corp.*, 637 So. 2d 960 (Fla. Dist. Ct. App. 1994), the court ruled that the Florida legislature intended that third party transferees of a time-share scheme could be held liable for alleged misrepresentations made by the original developer. *Id.* at 962. Also in Florida, a third party to whom unsold time-share units were transferred by a time-share developer was mandated by this same provision in the Florida Time-Share Act to honor the rights of purchasers. *See Smith v. Dept. of Bus. Regs.*, 504 So. 2d 1285 (Fla. Dist. Ct. App. 1987).

20. As *Kessler III* stated,

> This court's interpretation of § 18-14-601 is thus consistent with the nature of time-share projects,

> and the unique obligations that arise from the development and creation of such projects. The developer sells not only an interest in real property, but an interest in time. The time-share regime is meaningless unless the time-share purchaser's continued interests in the project are protected. Thus, when a developer's interests in the project are transferred to a third party, the transferee must acquire not only the interest in the property, but also all the other obligations of the developer with respect to the time-share regime.

*Id.*

21. NEI complains that holding it responsible for the obligations of the original developer is inconsistent with the intent of the drafters of this legislation. This argument has been advanced by NEI previously with no success. The American Resort Development Association ("ARDA") submitted requests to file *amicus* briefs in the proceedings before the Eighth Circuit on two prior occasions. ARDA filed its first *amicus* brief, containing these same arguments, prior to the Eighth Circuit's 8-2 *en banc* decision in favor of Plaintiffs after the panel decision in *Kessler III*. ARDA then requested leave to submit another *amicus* brief before the Eighth Circuit ruled in *Kessler IV*; however, the Eighth Circuit denied ARDA permission to submit the *amicus* brief. In any event, it is the function of the judicial branch to determine legislative intent. Numerous tribunals, including this court, have concluded that section 601 "means what it says."

22. In a footnote at the end of their opening brief, NEI argued that Plaintiffs' claims would be barred based on 12 U.S.C. § 1823(e). This was one of the defenses raised by NEI in the district court, which resulted in the district court granting summary judgment in favor of NEI. However, in *Kessler I*, the Eighth Circuit summarily rejected NEI's assertion, including that this federal law did not afford NEI a defense to Plaintiffs' claims.

23. This court believes that the Eighth Circuit's decision in *Kessler I* was correct. There has been no case that applies this federal law to the situation here, which involved a non-banking agreement that diminished the underlying value of a bank's collateral but did not affect the bank's security interest in that collateral.

24. NEI also argues that it is improper for Plaintiffs to seek a judgment prior to obtaining class certification citing authority for the proposition that summary judgment in a class action is *generally* not awarded until the class has been certified and notified, citing *Schwarzschild v. TSE*, 69 F.3d 293, 295 (9th Cir. 1995). In *Schwarzschild*, the Ninth Circuit explained that "pre judgment certification and notice to the class are necessary to protect the defendant from future suits by potential members of the class." *Id.* at 297.

25. For a number of reasons, this argument made by Defendants is not valid. First, this is no ordinary case. The federal district court certified a class in September 1997, well over six years ago. Notices were sent to all known potential class members at that time.

26. Second, after the class was certified in federal court and notices were sent, no additional suits were filed, and no putative class members sought to intervene or opt out of the class. No separate class members entered appearances through different counsel.

27. Finally, the rationale for pre judgment certification and notice, that the Defendants should be protected from future suits by potential class members, is not present here. Plaintiffs' cause of action arose in December 1993. No other suits by the class or those similarly situated to the class have been filed during the more than eleven years since Plaintiffs' use of their time-share interest was terminated. Thus, the basis for forbidding pre-certification judgment for the Plaintiffs is not present.

28. Defendants' contentions that the intent of the parties to the license agreement which previously allowed time-share owners to use hotel amenities, utilities and parking, and that the use was conveyed by deed, are wholly irrelevant. In the action filed by Defendants in 1994, *National Enterprises, Inc. v. Lake Hamilton Resort, Inc.*, Garland County Circuit Court No. 94-705, this court concluded that the Union Planters foreclosure in 1990 conclusively decided these issues. That litigation, of course, has now been conclusively adjudicated adverse to NEI by the Arkansas Supreme Court in its recent decision on January 22, 2004.

29. The court further disagrees with NEI's argument that it cannot be sued because it is identically situated to the Plaintiffs. This contention was rejected in both the *Rea* and *Kessler III* cases. These courts concluded that NEI purchased

the *developer's interest* in this time-share regime and was therefore liable for the obligations of the original developer pursuant to Section 601 of the Act.

30. The statute of limitations does not bar Plaintiffs' claims. The court agrees with the reasoning *of Kessler III*, in which the Eighth Circuit concluded that since NEI was subject to liability for the original developer's obligations pursuant to the Act, the Time-Share Act statute of limitations govern the action, citing *Shelton v. Pfizer*, 340 Ark. 89, 8 S.W.3d 557, 560 (2000) (a specific statute of limitations involving a particular subject matter governs). *See Kessler III* at 1014. Under ARK. CODE ANN. § 18-14-403, suit must be brought within four (4) years of a breach "with respect to the enforcement of provisions in the contract of purchase which require the continued furnishing of services." This action was initiated on November 27, 1996. The services were terminated on December 10, 1993. Thus, this action was filed within the four year statute of limitations in the Act. As *Kessler III* aptly noted:

> Due to NEI's unsuccessful attempt to enforce the license agreement, NEI is legally incapable of actually furnishing the described services. Thus, the Plaintiffs have no adequate remedy at law and are entitled, in the alternative, to pursue a claim for equitable rescission (citation omitted). We do not believe that this equitable remedy, sought in lieu of actual contract enforcement, equates to the type of rescission claim contemplated by the first limitation period set forth in 18-14-403. The Plaintiffs' suit is more appropriately viewed as an

> attempt to enforce contract provisions that require the continued furnishing of services, services for which the Plaintiffs made reciprocal payments (consideration for the original contract payments, or ongoing annual maintenance fees), with equitable relief sought in lieu of an adequate remedy at law. Thus, we hold that the action is governed by the second statute of limitations set forth in § 18-14-403, and is therefore timely.

*Kessler* at 1014.

31. After the Eighth Circuit in *Kessler III* reversed the district court on liability, it remanded for entry of a judgment granting Plaintiffs a partial equitable rescission of their time-share purchase contracts and calculation of damages. *See Kessler* at 1015. After remand, the district court entered an order on June 29, 2001 directing Plaintiffs to submit evidence of their damages under applicable law, concluding that Plaintiffs were entitled to recover "the purchase money paid, with interest from the date of each payment" with respect to their individual time-share purchases. *See Bates v. Simmons*, 259 Ark. 657 (1976). A copy of the district court order was made a part of the record in this case. The district court further ordered that it would calculate an offset based upon the years Plaintiffs enjoyed their time-share units, similar to the formula used by this court in calculating the damages awarded in the *Rea* case.

32. Subsequently, in September 2001, Plaintiffs, after conducting a claims process, submitted extensive documentation of their claims. Plaintiffs' First Amended and

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Substituted Motion for Entry of Judgment and Approval of Notice of Judgment in Class Action ("Plaintiffs' Motion") and Memorandum Brief in Support, and the attachments thereto, filed on September 26, 2001 in the federal district court is a part of the record remanded to this court. Plaintiffs have submitted a Time-Share Owners Master Damages Spreadsheet, which contains detailed information of the name of each purchaser, time-share unit and week number purchased, date of purchase, down payment amounts, total loan or installment payments, and the date on which the final loan or installment payments were made. This spreadsheet was updated by Plaintiffs to include the current amount payable based upon the additional interest that has accrued since September 2001.

33. The Master Damages Spreadsheet was constructed initially by using the computerized list of time-share purchasers produced in discovery by the Defendants in previous litigation. This list was attached to Plaintiffs' Motion for Class Certification, and was used to notify the Class of the pendency of this action in federal court. Subsequent to the district court's order of June 29, 2001, voluminous information was received from the Class. This information, along with further documentation of the purchase prices, mortgage amounts and down payments paid by the Class produced by Defendants in this case, *see* Plaintiffs' Motion, Exhibit "I," and numerous documents contained in the real estate records, provided the factual background for the Master Damages Spreadsheet and the other spreadsheets which delineate the various categories of purchasers.

*Appendix C*

34. Accompanying Exhibit C to Plaintiffs' Motion as an appendix was evidence submitted by the Class in support of their claim for an award in this case, supported by some 112 verified statements from the Class as to the amount of the award and the circumstances of each Class member's payments for their unit weeks. This information is arranged numerically and alphabetically, with a number assigned to each individual Class member.

35. Following the Time-Share Owners Master Damages Spreadsheet attached to Plaintiffs' Motion as Exhibit C were separate spreadsheets in which the claims of the Class have been organized into different categories based upon the manner in which the Class member paid for the time-share unit and the quality and type of evidence which supports each claim. *See* Exhibits "D," "E," "F" and "G" attached to Plaintiffs' Motion. These separate spreadsheets are outlined as follows:

> • *Time-Share Owners Damages Spreadsheet — Category I (Exhibit "D").* This spreadsheet contains a list of time-share owners who paid cash for their interval. The real estate records reflect that no mortgages ever encumbered these intervals. These submissions include affidavits by each such Class member verifying the payment, with supporting documentation including purchase documents marked "PAID" or "PAID IN FULL," copies of checks, credit card statements, or other records evidencing payment. Records produced by Defendants herein also confirm in most cases that full cash payments were made. *See* Plaintiffs' Motion, Exhibit "I."

*Appendix C*

• *Time-Share Owners Damages Spreadsheet — Category II (Exhibit "E").* This spreadsheet details a small number of Class members whom Class counsel could not contact, but whose purchases of an interval in cash can be verified by the fact that no mortgages were ever filed to encumber the interval, and whose payments can in many instances be independently verified by records produced by Defendants. *See* Plaintiffs' Motion, Exhibit "I."

• *Time-Share Owners Damages Spreadsheet — Category III (Exhibit "F").* This spreadsheet contains a list of Class members who paid down payments for their interval and then financed the balance of the purchase price. All of the Class members on this list purchased their interval in this manner and submitted verified statements of the amount of their purchase, and also submitted varying types of evidence in support of their claim, including copies of purchase documents, letters from the mortgagee evidencing that the loan was paid in full, debt instruments or contract documents marked "PAID" or "PAID IN FULL," copies of checks, credit card statements, check registers, account statements, records of some deposits made by the company which contracted with the Resolution Trust Corporation for the management of the time-share development prior to its purchase by Defendants in 1993, *see* Exhibit "J", letters from the company in charge of managing the development or other

documentation evidencing that payment was made, release deeds, and/or records produced by the Defendants evidencing that payment was made. *See* Plaintiffs' Motion, Exhibits "I", "K" and "L."

• *Time-Share Owners Damages Spreadsheet — Category IV (Exhibit "G").* This spreadsheet sets forth a list of time-share owners with whom Class counsel was unable to make contact; however, publicly filed documents, and documents produced by Defendants in this and previous litigation, establish that at a minimum substantial down payments were made. *See* Plaintiffs' Motion, Exhibit "I."

The above spreadsheets, attached as Exhibits C, D, E, F and G to Plaintiffs' Motion, include (a) each Class member's time-share purchase price and the amount of that purchase price which was actually paid by the Class member; and (b) the amount of interest, if any, paid by each Class member who financed any part of the actual purchase price of his or her time-share.

36. The Master Damages Spreadsheet contains an interest rate of six percent (6%) to be used by the Court in calculating the amount of interest to be paid from the dates of (a) the down payment made by each Class member; and (b) the final loan payment made by each Class member, if that Class member financed a part of the purchase price.

37. The rate of interest to be charged on the payments made by Plaintiffs should be "the rate of interest . . . currently

in use by those lending money." *See Lovell v. Marianna Fed. S & L Ass'n*, 267 Ark. 164, 589 S.W.2d 597 (1979). This court can take judicial notice of the interest rate. *See* ARK. R. EVID. 201(b) (permitting judicial notice of adjudicative facts that are generally known within the territorial jurisdiction of the trial court). Further, there is "considerable authority under Arkansas law that six percent (6%) per annum is the prevailing rate for any award of pre-judgment interest. *See Killam v. Texas Oil & Gas Corp.*, 303 Ark. 547 (1990) (tort); *Wilson v. Lester Hurst Nursery*, 269 Ark. 19 (1980) (contract).

38. The interest was calculated by compounding on an annual basis. The Arkansas Supreme Court has recognized that in an action for rescission the court applies equitable principles and attempts to restore the status quo or place the parties in their respective positions at the time of the sale. *See Bates v. Simmons*, 259 Ark. 657, 536 S.W.2d 292 (1976); *see also Heifner v. Hendricks*, 13 Ark. App. 217, 682 S.W.2d 459 (1985). In *Bates*, the purchaser under a land sale contract was awarded the purchase money paid with interest from the date of payment in order to restore the purchaser to its "pre-contract condition." *Id.* Accordingly, in order to return the Plaintiffs to their positions at the time of the purchases of their time-share units at Lakeshore, the interest should be compounded, much like the manner in which an award for future losses would be reduced to present value.

39. Moreover, in *Wilson v. Fayetteville*, 310 Ark. 163a, 838 S.W.2d 366 (1992), the Arkansas Supreme Court reversed the trial court, concluding that the lower court had erroneously failed to consider whether compound interest

was necessary to afford "just compensation," holding that "the landowner should not be deprived of the benefit of the compound interest on that amount." *Id.* at 841. The court recognized that compounding the interest should be considered in order to place the owner in the position he would have been in had the payment been made when it should have been, citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).

40. In sum, principles of equity require that the interest amount awarded to Plaintiffs be compounded on an annual basis in order to return the class to their pre-contract condition. Compounding interest awarded on the money paid by the Plaintiffs to purchase their time-share intervals in the mid-1980s is necessary, fair and equitable.

41. The parties can be returned to the status quo, just as this court ordered in *Rea* and the Eighth Circuit directed the district court to do in *Kessler III*.

42. Finally, Plaintiffs have submitted massive documentation concerning the amounts paid by Plaintiffs for their time-share units, and the interest they should be paid for the time during which Plaintiffs had no use of their time-share interests. This court had no difficulty fixing the plaintiffs' restitutionary reward in the *Rea* case; similarly, the district court in *Kessler III* was able to calculate the damages award to the Class based on the evidence submitted.

43. It is also equitable that Defendants are entitled to a credit for the time in which each time-share owner was able to use his or her interval. *See Bates*, *supra*. This court will

calculate the offset using precisely the procedure used by this court in the *Rea* case (which the federal district court also utilized in calculating an offset), which the Eighth Circuit noted was a correct decision of the case with substantially identical facts to those in the case at bar. *See Kessler III* at 1012.

44. The offsets based on Plaintiffs' use are calculated as follows:

(a) Seventeen (17) time-share purchases in the actual amount of $72,906.35 were made in 1985 where the purchasers' first opportunity to occupy the time-share occurred in calendar year 1985. Nine (9) opportunities to use the time-share out of an anticipated estate of thirty-six (36) years [1985-2020] equates to a twenty-five percent (25%) off-set. In terms of dollars, this portion of the off-set equals $18,226.59

(b) One hundred and ninety-two (192) time-share purchases in the actual amount of $1,064,989.76 were made in 1985 or 1986 where the purchasers' first opportunity to occupy the time-share occurred in calendar year 1986. Eight (8) opportunities to use the time-share out of an anticipated estate of 35 years [1986-2020] equates to a twenty-three percent (23%) off-set. In terms of dollars, this off-set equals $244,947.64.

(c) Fifty-nine (59) time-share purchases in the actual amount of $273,947.93 made in 1986 where the purchasers first opportunity to occupy the time-share was in calendar year 1987. Seven (7) opportunities to use the time-share out

of an anticipated estate of 34 years [1987-2020] equates to a twenty-one percent (21%) off-set. In terms of dollars, this off-set equals $57,529.07.

45. Accordingly, applicable setoffs representing opportunities to occupy the time-shares total some $320,703.30. This amount reduces the Plaintiffs' actual payments of $1,411,844.04, leaving a total of $1,091,140.74, which should be increased by interest in the amount of $904,858.93, calculated at the rate of six percent (6%) per annum from December 10, 1993 through April 19, 2004.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Dismiss or for Summary Judgment should be denied, that Plaintiffs' Motion for Summary Judgment should be granted, and that the Plaintiffs should have judgment against the Defendants, jointly and severally, in the amount of $1,995,999.67, plus post judgment interest thereon at the maximum allowable rate under Arkansas law, for all of which garnishment, execution and other legal process may issue.

IT IS FURTHER ORDERED that Defendants deposit the amount of this judgment into the registry of the court within thirty (30) days of the date of this order. [or pursuant to Rule 8 of the Rules of Appellate procedure post a supersedeas bond. *s/vsc*]

IT IS FURTHER ORDERED this court will retain jurisdiction of this action to disburse the judgment proceeds to class members in accordance with a claims procedure, which will be determined by the court, upon this judgment

becoming final and non-appealable. Until such time as this judgment becomes final and non-appealable, the court will not at this time require class counsel to submit a request for attorneys' fees, the court noting that class counsel previously filed a motion for attorneys' fees in the federal court action which is a part of the record remanded from the federal court, and the court will consider requests for attorneys' fees and will issue further orders concerning notice to the class pending this judgment becoming final and non-appealable.

IT IS SO ORDERED.

s/ Vicki S. Cook
Honorable Vicki S. Cook

Date: May 14, 2004

## APPENDIX D — EXCERPT OF DOCKET SHEETS

Case Number 04-646
Case Category: Law

NATIONAL ENTERPRISES, INC.
ARKANSAS NO. 1 LLC

V

DONALD D. KESSLER, ET AL.

* * *

09/15/2005 Substituted Opinion on Denial of Rehearing

ACTION = OTHER OPINION ACTION (MISC)

Opinion Date – 09/15/05 Consist of 0 pages,

Cite Number – Publish – yes

Robert Laidlaw Brown – WRITING

Rehearing denied in part and granted in part; substituted opinion issued simultaneously

See Brown, J., opinion this date.

* * * *

## APPENDIX E — EXCERPT OF BRIEF IN SUPPORT OF DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT, AND DEFENDANTS' RESPONSE TO COUNTER MOTION FOR SUMMARY JUDGMENT FILED JANUARY 21, 2004

**IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS**

NO. 96-1637 J

DONALD D. KESSLER AND MARY L. KESSLER, ET AL., on their own behalf and on behalf of others similarly situated

PLAINTIFFS

VS.

NATIONAL ENTERPRISES, INC.
AND ARKANSAS NO. 1 LLC

DEFENDANTS

**BRIEF IN SUPPORT OF DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT, AND DEFENDANTS' RESPONSE TO COUNTER MOTION FOR SUMMARY JUDGMENT**

*Appendix E*

## INTRODUCTION

The putative class representatives (sometimes, "Plaintiffs") fail to address one of the most critical assertions by Defendants, National Enterprises, Inc. and Arkansas No. 1 (collectively "Defendants"): Defendants and Plaintiffs have the *same type of real estate interests* in the condominium. Plaintiffs dodge this contention, and instead, quote from decisions in the Eighth Circuit Court of Appeals that are void and have no precedence. Plaintiffs' legal theory is now solely based on ARK. CODE. ANN. § 18-14-601, which provides that "[a]ny transfer of the developer's interest in the time-share program to any third person shall be subject to the obligations of the developer." ARK. CODE. ANN. § 18-14-601 (1987). Both Defendants and the putative class representatives are "third persons" who have received a "transfer" of a part of the developer's original interest in the time-share program — their respective time-share intervals. Thus, "any third person" under the putative class members' construction of the statute includes both Defendants *and* the putative class members. There is no other intellectually honest or principled conclusion.

The case involves allegedly injured persons suing similarly situated persons. No live case or controversy exists, and the Plaintiffs have no standing to sue Defendants. In addition, no misrepresentations have been made, and the action is barred by the applicable statutes of limitation and the federal *D'Oench, Duhme* doctrine codified by 12 U.S.C. § 1823(e). The Complaint should be dismissed.

Even if Plaintiffs had standing and a live controversy existed, even if misrepresentations had been made, and even if the action were not barred by the applicable statutes of limitation and the federal *D'Oench, Duhme* doctrine, Plaintiffs are improperly seeking summary judgment prior to any class certification or notice. In addition, there are material issues of disputed facts. Summary judgment in favor of Plaintiffs is improper.

## ARGUMENT

### I. The Class Representatives May Not Seek Pre-Certification Judgment.

Plaintiffs are seeking summary judgment prior to obtaining class certification and providing notice to absent, putative class members. Yet, it is improper for the putative class representatives to seek summary judgment prior to any class certification and notice. The class notice procedure must be executed before this Court addresses the issues that will fix the rights of the absent persons. On the other hand, it is proper for Defendants to seek judgment on the merits prior to class certification, because any such judgment will not bind absent putative class members. The cross-motions for judgment now pending are not a two-way street for the Court.

"[C]ourts generally do not grant summary judgment on the merits of a class action until the class has been properly certified and notified." *Schwarzschild v. Tse*, 69 F.3d 293,

295 (9th Cir. 1995).[1] "The purpose of [Rule 23] is to ensure that the plaintiff class receives notice of the action well *before* the merits of the case are adjudicated." *Id.*, *citing Postow v. OBA Fed. Sav. and Loan Ass'n*, 627 F.2d 1370, 1381-82 (D.C. Cir.1980); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 759-60 (3d Cir. 1974) (en banc), *cert. denied*, 419 U.S. 885 (1974); 7B WRIGHT, MILLER & KANE, FED. PRAC. & PROC. CIV.2D § 1788, at 222-23 (2d ed. 1986). The notice procedure triggers each absent putative class member's ability to exercise his or her rights in this action;

> Absent class members who learn of the pendency of a class complaint have several courses of action available to them:
>
> (1) wait for final disposition;
>
> (2) enter an appearance through counsel;
>
> (3) seek to intervene formally; or
>
> (4) in Rule 23(b)(3) suits, exclude themselves and, if desired, commence independent actions.

NEWBERG ON CLASS ACTIONS § 16:6 at p.146 (4th ed. 2002).

---

1. These federal cases cited herein are persuasive authority. "We have said that we will interpret Ark. R. Civ. P. 23 in the same manner the federal courts interpret the comparable Fed. R. Civ. P. 23." *Fraley v. Williams Ford Tractor and Equip.*, 339 Ark. 322, 336, 5 S.W.3d 423, 432 (1999).

On the other hand, the defendant in a proposed class action may seek judgment prior to class certification:

> In appropriate cases, the court may use an accelerated summary judgment procedure prior to class certification to test plaintiff's right to proceed to trial. [In such a case,] the court is not assessing whether there is a substantial possibility that plaintiff will prevail for purposes of deciding whether class certification is appropriate, but is determining that there are no genuine issues of material fact and that defendant is entitled to prevail as a matter of law on the underlying dispute.

*Thomas v. Moore USA, Inc.*, 194 F.R.D. 595, 603 (S.D. Ohio 1999) (quoting 7B Wright, Miller & Kane, FED. PRAC. & PROC. CIV. 2d § 1785, p. 127-128 (1986)); *see* NEWBERG ON CLASS ACTIONS § 7:35 (4th ed. 2002). However, "a defendant waives his right to have notice sent to the class . . . whenever he moves for summary judgment *before* the class has been properly certified and notified." *Schwarzschild*, 69 F.3d at 297.

This rule permitting a defendant to seek pre-certification judgment but prohibiting a plaintiff from seeking pre-certification judgment "was adopted to prevent 'one-way intervention' – that is, the intervention of a plaintiff in a class action after an adjudication favoring the class had taken place." *Schwarzschild*, 69 F.3d at 295. "Such intervention is termed 'one way' because the plaintiff would not otherwise be bound by an adjudication in favor of the defendant." *Id.*,

citing *Katz*, 496 F.2d at 759. The rationale for the rule is explained as follows:

> [T]he strongest argument for [forbidding] post-judgment class certification is that pre-judgment certification and notice to the class are necessary to protect the defendant from future suits by potential members of the class. But that rationale disappears when the defendant himself moves for summary judgment before a decision on class certification. In such a situation, '*the defendants . . . assume the risk that a judgment in their favor will not protect them from subsequent suits by other potential class members, for only the slender reed of* stare decisis *stands between them and the prospective onrush of litigants.*'

*Schwarzschild*, 69 F.3d at 297 (quoting *Postow*, 627 F.2d at 1382 (quoting *Haas v. Pittsburgh Nat'l Bank*, 381 F.Supp. 801, 805 (W.D.Pa. 1974), *rev'd on other grounds*, 526 F.2d 1083 (3d Cir. 1975))) (emphasis in original). Stated another way, "when a defendant prefers to take its chances on stare decisis rather than res judicata, the district court may grant the defendant's motion for summary judgment even though the class has not yet been notified." *Schwarzschild*, 69 F.3d at 297 (internal quotations omitted).

Here, Plaintiffs' Counter-Motion for Summary Judgment is premature. Plaintiffs have not yet obtained class certification or sent notice to absent putative class members. Thus, Plaintiffs' Counter-Motion should be denied.

*Appendix E*

Moreover, assuming for the sake of argument only that the second *Wilson* opinion applies in the present case, the trial court nevertheless should have permitted a jury to determine whether compounded interest was proper. Here, a jury should be permitted to hear any damages, and summary judgment in favor of Plaintiffs is improper.

With respect to damages, there are disputed facts concerning the number of claimants, the reliability and completeness of Plaintiffs' damages calculations, whether Defendants have been unjustly enriched, the amounts of set-offs to which Defendants are entitled as to each claimant; and whether pre-judgment interest should be compounded. The questions of fact concerning the amount of damages preclude summary judgment in favor of Plaintiffs.

*Appendix E*

## CONCLUSION

For these reasons, Defendants' Motion to Dismiss or for Summary Judgment should be granted, Plaintiffs' Counter Motion for Summary Judgment should be denied, the Complaint should be dismissed with prejudice. Defendants should be awarded all other proper relief to which they are entitled.

Respectfully submitted,

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By: s/ Stephen B. Niswanger
Peter G. Kumpe, Esq.
Stephen B. Niswanger, Esq.
Sarah M. Priebe, Esq.

*Attorneys for Defendants*

## APPENDIX F — EXCERPT OF BRIEF IN SUPPORT OF PLAINTIFFS' RESPONSE TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND COUNTER-MOTION FOR SUMMARY JUDGMENT FILED JANUARY 7, 2004

**IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS**

No. 96-1637J

DONALD D. KESSLER and MARY L. KESSLER, his wife, WILLIAM L. MARTIN and ANITA M. MARTIN, his wife, JAMES W. WALLACE and DORIS F. WALLACE, his wife, and CARROLL W. BROCKWELL and M. CATHRYN BROCKWELL, his wife, on their own behalf and on behalf of all others similarly situated

v.

NATIONAL ENTERPRISES, INC. and ARKANSAS NO. 1 LLC

**BRIEF IN SUPPORT OF PLAINTIFFS' RESPONSE TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND COUNTER-MOTION FOR SUMMARY JUDGMENT**

Plaintiffs respectfully submit their Brief in Support of their Response to Motion to Dismiss or for Summary Judgment and Counter-Motion for Summary Judgment.

*Appendix F*

## I.

## INTRODUCTION AND PROCEDURAL BACKGROUND

The class action complaint in this case was originally filed in this court on November 27, 1996. This action was filed after a judgment was entered against the same defendants on December 3, 1996 in *Charles P. Rea and Mickie Rea, his wife, v. National Enterprises Inc. and Arkansas No. 1 LLC,* Garland County Chancery Court No. 95-239-J, which was a case brought by plaintiffs similarly situated to the class herein based on facts virtually identical to those alleged in the class complaint in this action. *See* Response. Ex. 1.

* * *

## V.

## CONCLUSION

Based upon the foregoing argument and authority, this court should enter a judgment in favor of the class and against the Defendants, jointly and severally, in the amount of $1,958,439.05. Further, this court should reserve ruling on the issues of class attorneys' fees and the sending of proposed notice to all known class members until such time as the judgment becomes final and non-appealable.

*Appendix F*

Respectfully submitted,

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## APPENDIX G — EXCERPT OF HEARING BEFORE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS DATED APRIL 19, 2004

**IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS**
**DIVISION II**

**CASE NO. 96-1637-II**

**DONALD D. KESSLER and MARY L. KESSLER, his wife, WILLIAM L. MARTIN and ANITA M. MARTIN, his wife, JAMES W. WALLACE and DORIS F. WALLACE, his wife, and CARROLL W. BROCKWELL and M. CATHRYN BROCKWELL, his wife, on their own behalf and on behalf of all others similarly situated**

**PLAINTIFFS**

**VS.**

**NATIONAL ENTERPRISES INC. & ARKANSAS NO. 1 LLC**

**DEFENDANTS**

**TRANSCRIPT**

BE IT REMEMBERED that the above-captioned matter come on for hearing April 19, 2004, in the Circuit Court of Garland County, Arkansas, Division II, before the Honorable Vicki S. Cook, Circuit Judge, and the following is a transcription of the proceeding held, to-wit:

* * *

*Appendix G*

[2] **APRIL 19, 2004 — PROCEEDINGS:**

**THE COURT:** This is case number 96-1637 in which we have Mr. Bequette and Mr. Schnipper representing plaintiffs Donald D. Kessler, Mary L. Kessler, William L. Martin, Anita M. Martin, James W. Wallace and Doris F. Wallace and Carroll W. Brockwell and M. Catheryn Brockwell, on their own behalf and on behalf of other similarly situated versus National Enterprises Inc. and Arkansas No. 1 LLC. And they're represented by the Williams and Anderson Firm, and Peter G. Kumpe is here, and I understand, Mr. Reis, you're now entering an appearance.

**MR. REIS:** Your Honor, I filed it last week. It may not have made it into your file.

* * *

**THE COURT:** . . . We're here because the defense has filed a Motion to Dismiss or for Summary Judgment. And of course, the plaintiffs have responded with a Response and Counter Motion for Summary Judgment and [3] brief in support thereof, and also a Motion for Class Certification.

* * *

[13] * * *

**MR. BEQUETTE:** . . . We also filed the Motion for Class Certification as the Court was made aware in our papers. This class was previously certified by Judge Hendren way back in 1997 about nine or ten months after the case

was removed from this Court where we initially filed it back in November of 1996. Some eight, nine, ten months later Judge Hendren certified the class finding that we had over two hundred class members so numerosity requirements were met, questions of law in fact common to the clients, all those different things were met. This is a case that's very much suitable for class determination because every one of the plaintiffs is similarly, if not identically, situated. And so we filed a Motion for Class Certification — The only real material response that NEI makes is that, well, [14] ordinarily you don't — you don't adjudicate on the merits before you certify a class here at the same time. And I would agree, that's the general rule of law, ordinarily. Here in this case, I mean we've been in touch with all the class plaintiffs. The class has previously been certified as a class. All the class members have been notified, we're long, I mean no individual suits have ever been filed, there have been no — ah, ah, putative class members that have opted out or attempted to opt out of the class ever from 1997 forward. And there's little, if any likelihood, I think it's probably nil, that the concerns about having that rule that you don't adjudicate on the merits before you certify, the rationale just isn't present, because you're not going to get any additional lawsuits. The time has long since past for that, so we submit to you today, Your Honor, that — ah, that a judgment should be entered in favor of the class. The class should be certified and that — ah, basically a new notice should be sent out to the class notifying them of the new judgment in the state court case. I stand available for any question you may have.

**THE COURT:** The only question I was going to ask would be what about his concerns that the class should be

certified before a Motion of Summary Judgment could [15] be granted, and I think you've answered that.

**MR. BEQUETTE:** Right, I think given the extraordinary circumstances of this case I think the Court can safely certify the class and enter a judgment at the same time because the rationale behind — ah, certifying the class and then wait to adjudicate the merits of the case on Summary Judgment or otherwise is just not present because there's just no likelihood that you're going to have people, you know, the idea behind it is you don't want to have people waiting to see how the case comes out before they opt out of the class and that's just not present here.

**MR. KUMPE:** Your Honor, not withstanding counsel's representations to his conscientious efforts to talk and discuss with class members nor his representations concerning the fact that something may or may not happen in this case, what happened in federal court because there was no jurisdiction is as if it never happened; therefore, these absent class members and NEI have absolutely no benefit of the Rule 23 process. That process has got to be completed again under this Court's jurisdiction so that any orders that the Court enters ultimately will have finality with respect to all the class members. And the representations of counsel don't overcome the strong and consistent [16] admonitions of the Supreme Court of Arkansas that it is improper to reach the merits of the case at the class certification stage. That's because some of these absent class members may want to bring their own attorney. They may not think that Mr. Bequette's numbers are the right numbers. They may think they want to get more. And they have that right under

Arkansas law. And for the Court to rush to judgment without going through the certification process denies them that right. Your Honor, we are at the stage of Rule 12 motion. We haven't even filed our answer yet. We haven't put on the record our defenses to the claim which we're absolutely entitled to do. As the Court said you may be persuaded that the path of decision in this case is quite clear but these defendants are entitled to make a record along that path. And there is simply no basis on which at the stage of a complaint without even an answer being filed for this Court to rush to judgment. More importantly, concerning all of the allegations that plaintiff had made in his papers there are material disputes of fact. Notwithstanding the fact that Judge Hendren did liquidate a number, the very order in which he liquidated the number he said there had to be a procedural opportunity because this number may not be right. And that's in Judge Hendren's [17] Order. Of course, we believe that the only way this matter can be adjudicated is to look at each, the circumstances of each one of these plaintiffs because each of these plaintiffs are different in terms of the amount of money they paid, in terms of when they bought their units, in terms of the use and enjoyment they had, and with respect to many of them, Judge, they gave up their time-share units before '93. They conveyed them back to other parties, they — they — ah, failed to make payments, and all of their rights were exhausted or they abandoned their rights before these amenities were ever turned off. So the only class that reasonably could be certified are those time-share owners like the Reas who had the right to use the unit in '93 when the amenities were terminated. Judge, we have a right to answer this complaint, to set out our defenses. We must go through a class certification process before this Court can

reach the merits. Now, I have not addressed our objections to the certification or how it's going to be certified because Mr. Reis is going to — ah, take that issue.

* * *

[20] * * *

**MR. REIS:** . . . Your Honor, to follow up on Mr. Kumpe's remarks, in this instance if the Court were to satisfy — if the Court were to certify this class action the effect on the defendants in this case, it would be that they would lose the res judicata effect in any decisions. The decisions that would be made in this trial would be binding only on those persons who are parties to this case and we would be open to suit by any person down the road — ah —and so, the only benefit to a defendant or the benefit to a defendant in a class action is that once the class is certified any judgment means to the defendant that [21] the defendant is out of the woods and the case is over. If you do this as proposed by the plaintiffs or the representative plaintiffs then we lost the one advantage that class actions have to offer. That's all I have, Your Honor, and I will answer any questions if the Court has any.

**THE COURT:** I would like you to answer squarely why this case is not unique and why there was a certification many years ago by the Federal Court that you feel compelled for the expense and judicial time to go through this again? Simply just to make a record for the benefit of you folks?

**MR. REIS:** No, Your Honor. First of all, we all started this hearing today with an agreement and I think everyone

said exactly the same thing. And what everyone said when we began this is that although what happened in the Eighth Circuit is interesting and perhaps instructive, it's not precedential. And so everyone said that to begin this hearing. My client truly believes that they have no liability in this case and we're not embarrassed to say that. We believe that this case, that there should be no certification of the class in this instance. And just for example, Your Honor, on the issue of numerous —

**THE COURT:** No, but you're not — I guess you're [22] just telling me that even though it's been certified, even though they've taken all these steps to find every single person that I must just ignore that because the federal court did not have jurisdiction and all those actions have to be repeated.

**MR. REIS:** Yes, Your Honor, and I don't think there's any question about that and I don't think counsel will seriously dispute that. But once again, we truly believe, Your Honor, that this class should not be certified because it doesn't meet the requirements. And just for one example, Your Honor, and Mr. Kumpe eluded to this, among these owners we believe that there are only seven plaintiffs can truly qualify for relief in this case because during this period of time before we ever became involved the people that they say are class members have sold their interest or transferred their interest away or they have stopped paying their POA dues, or they have not paid their purchase money interest in these condos and so we believe, Your Honor, when it comes down to proving up and making an appellate record as the *Lenders Title* case suggests but the true number is only seven

that the numerosity requirement has not been met. We also believe that the other requirements are not met, but the Supreme Court has told us just last year [23] that there has to be, before a class can be certified, that there has to be a record that's adequate for appellate review to make all of the findings that are required for certification of a class. And does my client insist on that? Yes, Your Honor, because we think we're right. And I'm sorry that this matter has gone on a long time but that is our position. We do believe that we're right and we believe we're entitled to it.

* * *

[24] * * *

**MR. BEQUETTE:** . . . We think as the Court mentioned in the interest of judicial efficiency that the Court should enter both a Summary [25] Judgment and a Judgment — an Order Certifying a Class.

* * *

[28] * * *

**MR. BEQUETTE:** . . . We're splitting hairs on procedural issues here because the facts of the matter are this is a suitable case for class determination, there's just no question about it. It begs for class certification. And the issue is, are we going to do it the same time we [29] adjudicate the merits? In this case, it's absolutely appropriate. I think our Supreme Court's going to agree with you on that because of the facts of this case.

* * *

*Appendix G*

[32] * * *

**THE COURT:** At this time, first of all, the Court denies the Defendants' Motion to Dismiss or their Motion for Summary Judgment. The Court is going to allow and grant the Motion for Class Certification. And furthermore, the Court is going to grant the Motion for Summary Judgment that has been filed by the plaintiff. The Court request when you do your Order granting these, you set out the findings of fact, the conclusions of law, and then I do understand that we will have to have, if that is upheld, after it's appealed, we will have to have a claims hearing and try to figure out what the actual damages are, if any.

* * * *

**APPENDIX H — EXCERPT OF APPELLANTS' PETITION FOR REHEARING AND SUPPORTING BRIEF TO THE ARKANSAS SUPREME COURT FILED JULY 15, 2005**

**IN THE SUPREME CO JRT OF ARKANSAS**

**NO. 04-646**

**NATIONAL ENTERPRISES, INC. and ARKANSAS NO. 1 LLC**

**PETITIONERS**

**V.**

**DONALD D. KESSLER AND MARY L. KESSLER, et al. on their own behalf and on behalf of all others similarly situated**

**RESPONDENTS**

ON APPEAL FROM THE CIRCUIT COURT
OF GARLAND COUNTY, ARKANSAS

HONORABLE VICKI S. COOK, CIRCUIT JUDGE

**APPELLANTS' PETITION FOR REHEARING AND SUPPORTING BRIEF**

*Appendix H*

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* * *

. . . developer under ARK. CODE ANN. 18-16-401 by virtue of foreclosing on a mortgage interest in unsold timeshare units.

**III. Appellants cannot waive the due process rights of absent class members to notice and an opportunity to be heard in this action, and the Court's opinion erroneously permits an adjudication of the claims of class members without protecting their constitutional rights.**

The Court's opinion holds that appellants have waived the issue of whether due process requires notice and an opportunity to be heard to absent plaintiff class members

before their claims are adjudicated. This is constitutional error. The due process rights to notice and an opportunity to be heard are rights that belong to the absent plaintiff class members, not to the appellants. In an action with absent class plaintiffs:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present to their objections." The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

*Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985) (citations omitted).

This Court's opinion violates the due process requirements that are afforded to absent plaintiff class members by affirming a judgment as to liability on their claims in this case. This affirmance, in the absence of notice

and an opportunity to be heard and opt out, violates their due process rights, and exempts them from any binding effect of this lawsuit. The absence of *res judicata* effect gives appellants standing to raise this issue, but it does not give appellants the power to waive this constitutional protection, which belongs to the absent plaintiffs. Appellants have good reason to be concerned that absent class plaintiffs will not be bound by the liability judgment in this action and can start anew in another lawsuit, because their due process rights have been denied.

Appellees erroneously argued that appellants do not suffer prejudice because the limitations period has expired on all claims other than claims in this lawsuit. That is simply not the case. Absent class members are entitled to the tolling of the statute of limitations on their claims until class certification is denied. *Crown, Cork, & Seal Co. v. Parker,* 462 U.S. 345, 354 (1983); *Blaylock v. Shearson Lehman Brothers Inc.,* 330 Ark. 620, 624 (1997) (adopting the holding of the *Crown* Court). Thus, if this case is timely under the relevant statutes of limitations, then the claims of absent class members are tolled, regardless of whether they participate in this lawsuit or, exercising their due process rights, opt out and begin their own lawsuits. Moreover, appellants perceive that this Court, like the trial court, believes that the issues of notice were fully addressed in the federal case. This, however, is absolutely incorrect, because there was no federal jurisdiction to support any action by a federal court in this case. Actions taken without subject matter jurisdiction are a nullity, and the null actions by Judge Hendren cannot supply constitutional notice to absent class members. Moreover, as a practical matter, the notice provided in Judge Hendren's

court was of a different lawsuit, and did not provide notice concerning the pendency of this action in Garland Circuit Court or the cross motions for summary judgment, or provide the absent class members an opportunity to opt out.

This Court's waiver holding is fundamentally flawed. The appellants cannot waive the rights of absent class plaintiffs. The absent class plaintiffs are entitled to this process before their rights are adjudicated, and the denial of this process means that they have an ability to avoid any preclusive effect of this liability determination, which substantially prejudices these appellants and subjects them to the prospect of multiple claims for liability.

WHEREFORE, appellants respectfully request that this Court grant their petition for rehearing, rehear the case on the issues set forth above, hold specifically (a) that the trial court's order requiring a deposit of funds is erroneous and should be reversed along with the damages, (b) that the Arkansas statute does not create liability for appellants in the circumstances of this case because they acquired their interest through mortgage foreclosure by succession to the rights of a lender, and (c) that the trial court's entry of judgment before providing notice to absent plaintiff class members was error and must be reversed, and that this Court award appellants all other just and proper relief.

*Appendix H*

Respectfully submitted,

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## APPENDIX I — EXCERPT OF APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR REHEARING AND SUPPORTING BRIEF FILED JULY 25, 2005

**IN THE SUPREME COURT OF ARKANSAS**

No. 04-646

NATIONAL ENTERPRISES, INC.
and ARKANSAS NO. 1 LLC

PETITIONERS

V.

DONALD D. KESSLER AND MARY L. KESSLER, HIS WIFE, WILLIAM L. MARTIN AND ANITA M. MARTIN, HIS WIFE, JAMES W. WALLACE AND DORIS F. WALLACE, HIS WIFE, AND CARROLL W. BROCKWELL AND M. CATHRYN BROCKWELL, HIS WIFE, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

RESPONDENTS

**APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR REHEARING AND SUPPORTING BRIEF**

Appellees, Donald D. Kessler, et al., by their attorneys, respectfully submit their Response to Appellants' Petition for Rehearing and Supporting Brief. In support of their Petition for Rehearing, Appellants argue that this Court's

opinion of July 1, 2005 contained certain mistakes. Appellants' petition for rehearing should be denied because this Court's decision was not based on mistakes of either fact or law, and was not erroneous.

I.

THIS COURT CORRECTLY AFFIRMED THE CIRCUIT COURT'S ORDER DIRECTING PAYMENT OF $1,995,999.67 INTO THE REGISTRY OF THE COURT.

First, Appellants contend in their Petition for Rehearing that "without explanation and apparently erroneously, this Court left intact the trial court's order to deposit the sum of $1,995,999.67 into the registry of the court as part of the judgment or as a supersedeas bond." *See* Petition at 1. Appellants are wrong. This Court specifically "declin[d] to reverse" the trial court's . . .

* * *

Finally, there is no doubt here that NEI purchased the original developer's interest in this time-share development. NEI purchased all of the unsold time-share units in the project, which amounted to approximately eighty percent (80%) of the entire time-share scheme. The notion advanced by Appellants that the Arkansas Time-Share Act was not intended to create a lender liability cause of action defies basic common sense and logic. Section 601 of the Act, very simply, means what it says. When the original developer's interest in the project is transferred to a third party such as NEI, the transferee (NEI) acquires not only the interest in

the property but all the other obligations of the original developer with respect to the time-share regime. Appellants' suggestion that the business of lending on time-share projects would "grind to an abrupt halt" is wholly unsupported by any evidence whatsoever and is indeed undermined by the facts. The Act has been on the books in Arkansas for over 20 years. There is no evidence that the Act has inhibited time-share project development in that time. The Act was passed some four years before the $3 million loan was made to the original developer of this time-share project. A number of cases on this provision of the Act have been decided by the courts of other states during this time, with no apparent impact on the development of time-share projects.

III.

THIS COURT'S OPINION THAT APPELLANTS WAIVED THE CLASS NOTICE ISSUE WAS CORRECT.

Finally, this Court correctly held that Appellants waived the notice issue. It is plainly clear that Appellants wanted to have their cake and eat it too, by moving for summary judgment in the trial court prior to class certification and notice to the class, then arguing on appeal after Appellants lost on summary judgment that it was not appropriate to have an adverse judgment entered against them prior to notice being given to the class. Appellants waived the notice issue when they moved for judgment prior to class certification. Appellants are not prejudiced at all, because judgment has been entered in favor of the class. The likelihood of any putative class member opting out of the class at this juncture is minimal, given the favorable result on liability and the

number of years that have passed since the time-share owners lost their right to use their property. Strangely, Appellants have offered no response to this Court's reference to the significant federal case law directly on point with the waiver of class notice issue. *See Schwarzschild v. TSE*, 69 F.3d 293 (9th Cir. 1995) and *Postow v. OBA Fed. Say. and Loan Ass'n.*, 627 F.2d 1370 (D.C. Cir. 1980).

WHEREFORE, Appellees pray that this Court deny Appellants' Petition for Rehearing, and for all other appropriate relief to which Appellees may be entitled.

Respectfully submitted,

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